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IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Constitution permits Congress to enact legislation dictating the retrospective remedy available to private parties in a single pending adjudication, while creating a different legal standard that will apply in all future proceedings of the same kind.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following were parties in the consolidated review proceedings before the court of appeals:

BP Exploration (Alaska) Inc.

BP America Production Company

BP Pipelines (Alaska) Inc.

ExxonMobil Pipeline Co.

Petro Star Inc.

Flint Hills Resources Alaska, LLC

Williams Alaska Petroleum Inc.

State of Alaska

Union Oil Company of California

Amerada Hess Pipeline Corp.

ConocoPhillips Alaska Inc.

ConocoPhillips Transportation Alaska Inc.

Koch Alaska Pipeline Co.

OXY USA Inc.

Tesoro Alaska Petroleum Co.

Unocal Pipeline Co.

RULE 29.6 STATEMENT

Petitioner Exxon Mobil Corporation has no parent company, nor is there any publicly held company owning 10% or more of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Exxon Mobil Corporation ("ExxonMobil") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the D.C. Circuit is an unpublished but precedential decision (D.C. Cir. R. 32.1(b)(1)(B)) reported at 268 F. App'x 7 and reproduced in the Appendix to this Petition ("App.") at 1a-7a. Opinion 481 of the Federal Energy Regulatory Commission ("Commission") is published at 113 F.E.R.C. ¶ 61,062, and is reproduced at App. 89a-199a. Opinion 481-A of the Commission on rehearing is published at 114 F.E.R.C. ¶ 61,323, and is reproduced at App. 28a-88a. Opinion 481-B of the Commission on rehearing is published at 115 F.E.R.C. ¶ 61,287, and is reproduced at App. 8a-27a.

JURISDICTION

The court of appeals entered judgment on March 6, 2008. App. 1a. A petition for rehearing was denied on May 20, 2008. App. 200a-201a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

LEGISLATIVE PROVISIONS INVOLVED

Relevant provisions of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users ("SAFETEA-LU" or "Act"), Pub. L. No. 109-59, 119 Stat. 1144 (2005), are reproduced at App. 202a-203a.

INTRODUCTION

This case presents a separation-of-powers question of national significance: can Congress legislate the retrospective relief available in a single federal adjudication among private parties while creating a different prospective legal standard that applies to all other proceedings of the same kind? The court below answered "yes," thereby sanctioning congressional interference with pending adjudicative proceedings far beyond what this Court's precedents permit and what other lower courts have interpreted those predecents to allow.

Indeed, if the decision below is correct, then Congress may, without altering substantive law, undo monetary relief awarded to a *particular* private party in a *particular* proceeding simply because it does not like the result of that proceeding. That rule would invite the sort of shocking mischief evident in the legislation at issue here – a provision added to a sprawling appropriations bill at the last minute, at the behest of parties unhappy about the outcome of a particular litigated dispute among private entities, and without any recorded debate among the legislators. This Court's separation-of-powers case law has wisely avoided providing constitutional cover for case-specific legislation for which Congress pays no political price and which presents an opportunity for corruption on an unprecedented scale.

But the D.C. Circuit's decision calls into question the vitality of those precedents, especially *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871). Despite this Court's more recent attempts to clarify its reach, *Klein* continues to bedevil lower courts and commentators alike. This case presents the Court with an opportunity both to reaffirm *Klein*'s core separation-of-powers principle and to dispel the

confusion that persists in the lower courts. The Court can do so, moreover, in a case where injustice is manifest. Certiorari should be granted.

STATEMENT OF THE CASE

The Trans Alaska Pipeline System ("TAPS") is a pipeline that transports crude oil from Alaska's North Slope to Valdez, Alaska. "Oil produced on the North Slope originates from several fields, each of which contains crude oil of differing characteristics" and thus varying qualities and values. App. 92a. The pipeline functions by combining all of the oil in a common stream that is transported to Valdez, with refiners (such as Williams Alaska Petroleum, Inc. and Petro Star, Inc., parties below)[1] removing certain petroleum products along the way. See generally *Exxon Co., USA* v. *FERC*, 182 F.3d 30, 34 (D.C. Cir. 1999); *OXY USA, Inc.* v. *FERC*, 64 F.3d 679, 685 (D.C. Cir. 1995). The end result is that each shipper receives at the Valdez terminus a quantity equal to the volume it injected at the north end, but the shipper "will not in all likelihood receive the same quality of oil at Valdez that it delivered to the pipeline." *Tesoro Alaska Petroleum Co.* v. *FERC*, 234 F.3d 1286, 1287 (D.C. Cir. 2000); *Exxon*, 182 F.3d at 34.

To address the disparities created, Respondent the Federal Energy Regulatory Commission ("FERC" or "Commission") in 1984 approved a settlement establishing a "Quality Bank" that "makes monetary adjustments [among] shippers in an attempt to place

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[1] On March 31, 2004, Williams sold its Alaska refinery to Koch Industries ("Koch"), but retained the liability for TAPS refunds prior to the date of sale. Flint Hills Resources Alaska, LLC is the Koch subsidiary currently operating that refinery.

each in the same economic position it would enjoy if it received the same petroleum at Valdez that it delivered to TAPS on the North Slope." *OXY*, 64 F.3d at 684. The Quality Bank requires that shippers that receive lower-quality oil at Valdez than they delivered to TAPS receive payments collected from (1) shippers who receive higher-quality oil at Valdez than they delivered, and (2) refiners who removed higher-quality cuts from the TAPS common stream.

Much of the protracted litigation over the last 20 years has focused on the valuation methods under the Quality Bank. As is relevant here, the Commission in 1993 approved a contested settlement that replaced its previous methodology with a "distillation" methodology. Under the latter, the crude oil stream is separated into its component "cuts" of petroleum products. Each cut – including "Resid," which is further refined to produce residual fuel oil – is then assigned a value based on the adopted formula. App. 93a-94a.

In the 1995 *OXY* decision, the D.C. Circuit upheld the distillation methodology. It also held, however, that the Commission's valuation of the Resid cut (among others) was arbitrary and capricious, and remanded for further proceedings. 64 F.3d at 693-96, 701. On remand, the Commission approved a settlement methodology proposed by nine parties but opposed by ExxonMobil and one other shipper, and applied it prospectively only. *Exxon*, 182 F.3d at 36-37.

On a second appeal, the D.C. Circuit sustained parts of the Commission's order, but also held that the Commission's "decision to apply the settlement prospectively was an abuse of discretion." *Id.* at 50. The court of appeals observed that "all of the TAPS shippers were on notice as of 1993 that the valuations

were contested," and "[t]he goals of equity and predictability are not undermined when the Commission warns all parties involved that a change in rates is only tentative and might be disallowed." *Id.* at 49 (internal quotation marks omitted). Here, "all of the parties participated in the proceedings before the agency," and thus "[a]ny reliance that they may have placed on the rates in light of these proceedings was unwarranted." *Id.* "[A]bsent detrimental and reasonable reliance," the D.C. Circuit stated, failure to apply the lawful valuations retroactively "allows some parties to keep some unlawful overcharges without any justification at all." *Id.* (internal quotation marks and alterations omitted).

Following the D.C. Circuit's decisions in *Exxon* and the separate *Tesoro* appeal, a hearing on a number of contested issues, including the proper valuation of the Resid cut, was held concurrently before Administrative Law Judges ("ALJ") of the Commission and the Regulatory Commission of Alaska (which has jurisdiction over intrastate TAPS transportation). App. 91a, 97a-99a. "The hearing took 108 days, with 19 witnesses, and 1474 exhibits introduced into evidence." *Id.* at 97a. On August 31, 2004, the FERC ALJ issued a comprehensive 949-page Initial Decision ("ID"), ruling in favor of ExxonMobil on many valuation issues. The ALJ, implementing the mandate of the court of appeals, ordered full refunds back to December 1, 1993 to correct the prior unlawful valuations. *Id.* at 193a-199a.

Although the ID did not purport to determine the amount of refunds (a task that would be performed by the Quality Bank Administrator after completion of the proceedings), ExxonMobil was entitled under the

ID to refunds in excess of $150 million. The Alaskan refiners, on the other hand, were found to have dramatically underpaid the Quality Bank for the oil they removed from the common stream. Williams and Petro Star had potential refund liability (for Resid alone) likely exceeding $100 million and $25 million, respectively, dating back to December 1, 1993.

A. Legislative Limitation Of Refunds

While the Commission's review of the ID was pending, Congress intervened. Language appeared in Committee reports of unrelated appropriations bills expressing concerns about any Quality Bank refunds for more than a 15-month period. H.R. Rep. No. 108-792, at 1640 (2004); S. Rep. No. 108-353, at 146 (2004). (Senator Stevens of Alaska at the time chaired the Senate Appropriations Committee, and Representative Young of Alaska was Chairman of the House Transportation and Infrastructure Committee). On April 14, 2005, Alaska Senators Murkowski and Stevens and Representative Young wrote to the Commission "to express our concern" about the ID's impact on Alaskan refiners and to urge the Commission to rule in their favor on the issue of refunds (an act of Congressional pressure on agency adjudication that itself potentially raised grave due process concerns[2]). D.C. Cir. Joint App. 1311-12 (R.1209). Shortly thereafter, the Senators and Representative Young introduced bills to abolish the Commission's power to order refunds that applied

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[2] As a matter of both separation of powers and due process, "[a]n administrative adjudication is invalid if based in whole or in part on congressional pressures." *ATX, Inc.* v. *USDOT*, 41 F.3d 1522, 1527 (D.C. Cir. 1994) (alterations and internal quotation marks omitted).

just-and-reasonable valuations retroactively; those bills disclaimed any intent to interfere with ongoing agency adjudication, and instead applied prospectively to all TAPS Quality Bank adjustment orders issued after December 31, 2005. S. 822, 109th Cong. (2005), H.R. 2038, 109th Cong. (2005); see 151 Cong. Rec. S3736, S3751-53 (daily ed. Apr. 15, 2005); 151 Cong. Rec. E825, E826 (daily ed. Apr. 28, 2005).

The final legislation that emerged was far different. It was embedded as one provision (section 4412, App. 202a-203a) in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users ("SAFETEA-LU"), Pub. L. No. 109-59, 119 Stat. 1144 (2005), a massive $286 billion appropriations law. Section 4412 was tucked next to the provisions creating the infamous $452 million "bridges to nowhere" – "Don Young's Way," Pub. L. No. 109-59, § 4411, 119 Stat. at 1778, and the Bartholomew bridge that was to connect one Alaskan island with 50 residents to another remote Alaskan island, *id.* § 4410, 119 Stat. at 1778. See Michael Grunwald, *Pork By Any Other Name*, Wash. Post (Apr. 30, 2006), at B01. Congress held no hearings or floor debate on section 4412; it did not even appear in any bill until the conference report was issued on the evening of July 28, 2005. See Library of Congress, Thomas: Bills, Resolutions (last visited Aug. 13, 2008), http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00003:@@@X|TOM:/bss/d109query.html (detailing chronology and pre-conference bills).

The SAFETEA-LU was passed the next day. *Id.* The parent company of one of the refiners that benefitted from section 4412 bragged about the "hard-won federal legislation" relieving it of refund liability. ASRC, *Annual Report* 1 (2005), *available at* http://www.asrc.com/_pdf/_annualreportsASRC2005.pdf.

Section 4412 creates two rules relating to the Commission's power to order TAPS Quality Bank refunds. The first, subsection (b)(1), governs only this proceeding. It provides that "[i]n a proceeding commenced before the date of enactment of this Act, the Federal Energy Regulatory Commission may not order retroactive changes in TAPS quality bank adjustments for any period before February 1, 2000." Pub. L. No. 109-59, § 4412(b)(1), 119 Stat. at 1778, App 202a. There was *no* proceeding other than this one pending before FERC regarding the TAPS Quality Bank valuation methodology.

The second provision, subsection (b)(2), declares the law of general and prospective application for all other TAPS Quality Bank proceedings: "In a proceeding commenced after the date of enactment of this Act, the Commission may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding." *Id.* § 4412(b)(2), 119 Stat. at 1778-79, App. 202a-203a. Subsection (c) in turn requires shippers to file claims within two years after they arise, and requires the Commission to issue a final order "[n]ot later than 15 months after the date on which a claim is filed." *Id.* § 4412(c)(2), 119 Stat. at 1779, App. 203a. Thus, prospectively in every TAPS Quality Bank proceeding other than this one, subsections 4412(b)(2) and (c) together authorize the Commission to order retroactive Quality Bank adjustments back to the original claim, with no limitation on refunds if (as here) proceedings are extended by repeated judicial vacatur of the Commission's orders.

By enacting a February 1, 2000 cutoff date, section 4412(b)(1) deprives ExxonMobil of approximately $125 million in Resid refunds.[3] Senator Murkowski later defended this "Congressional intervention in regulatory/legal disputes" because in her view "the process appeared to be broken and was not capable of producing a fair and timely resolution of the conflict," blaming what she perceived as ExxonMobil's "hardening of settlement terms." App. 204a-205a (Letter from Sen. Lisa Murkowski to R.W. Tillerson (Aug. 22, 2005)).

B. Commission's Implementation Of Section 4412(b)(1)

Because section 4412(b)(1) forbade refunds for periods before February 1, 2000, in reviewing the ID the Commission addressed only whether refunds back to that date should be ordered. App. 183a. On that question, the Commission rejected the arguments against refunds of the "Eight Parties" who opposed ExxonMobil. The Commission stated that "no public interest is at stake," for "the issue is determining how a pool of money is to be divided among shippers, and does not involve the public at large." *Id.* at 185a. It found no merit in claims that refunds were inequitable, because the refiners were on notice in 1993 that the prior, provisional valuation methodology was subject to change. *Id.* at 186a-192a.

C. The Opinion Below

ExxonMobil filed a petition for review that, among other things, challenged section 4412(b)(1) as unconstitutional. The court of appeals dispensed

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[3] The legislation also deprives the State of Alaska of approximately $31 million in royalties and taxes that would have been paid on the refunds.

with ExxonMobil's separation-of-powers challenge in a single sentence, holding that "any claim that Congress's decision here unconstitutionally exercised judicial power is foreclosed by [its] decision in *National Coalition to Save Our Mall* v. *Norton*, 269 F.3d 1092 (D.C. Cir. 2001)." App. 4a. The court likewise rebuffed Exxon's challenge under the Fifth Amendment, holding that section 4412(b)(1) had a rational basis because "Congress could easily have concluded that limiting the retroactivity of refunds would help provide certainty to parties affected by FERC's decision." *Id.*

REASONS FOR GRANTING THE PETITION

The decision of the D.C. Circuit in this case grants Congress a blanket license to dictate the retrospective monetary relief available to private parties in a single case without having to apply that same rule prospectively. This is not only a blatant exercise of a core judicial function, but also one that encourages aggrieved litigants to run to their local members of Congress in the hope of undoing unfavorable judicial rulings. The potential for corruption in such an enterprise is both real and unacceptable. Because the enactment affects only the particular private litigants to the specific controversy being litigated, the normal legislative check on adopting a rule of general applicability is eliminated. This is not separation of powers; it is arrogation of power, and it is unconstitutional. The rule below – which broadly applies to adjudications not only in administrative agencies but also in federal courts – conflicts with the precedents of this Court and is contrary to the teachings of numerous courts of appeals. This Court's review is imperative.

I. THE DECISION BELOW CONFLICTS WITH PRECEDENTS OF THIS COURT.

A. The Separation Of Powers Forbids Congress From Dictating The Results Of A Single Pending Adjudication Without Changing The Generally Applicable Law.

As James Madison foresaw, intrusions of Congress upon the powers of other branches require the greatest vigilance: "Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments," thus extending its power "beyond the legislative sphere." The Federalist No. 48, at 332-34 (James Madison) (J. Cooke ed., 1961). "To forestall the danger of [this] encroachment," *Metro. Wash. Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (citing Federalist 48), this Court has repeatedly held that Congress may not "'invest itself or its Members with either executive power or judicial power,'" *id.* (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928)). "'It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.'" *United States* v. *Brown*, 381 U.S. 437, 446 (1965) (quoting *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 136 (1810)).

In this Court's landmark decision in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871), the Court held that Congress is forbidden from exercising the judicial power not only directly, but also indirectly by passing laws that dictate the results in pending

cases. In *Klein*, the administrator of the estate of a Confederate sympathizer sought to recover the proceeds of cotton abandoned to federal treasury agents. The decedent had taken an oath of allegiance to the United States and received a presidential pardon. This Court's precedent held that such an oath satisfied the loyalty requirement of the reimbursement statute. In 1870, while Klein's case was pending, Congress passed legislation providing that a presidential pardon that recited a recipient's participation in rebellion conclusively proved disloyalty, and directing the dismissal of any pending reimbursement action for lack of jurisdiction. *Id.* at 132-34.

The *Klein* Court declared the statute unconstitutional because it sought to "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146. It made no difference that the legislation targeted a case arising from the Court of Claims, an Article I tribunal. See *Ex Parte Bakelite Corp.*, 279 U.S. 438, 454 (1929). Congress simply lacked "constitutional authority *to control the exercise of [this Court's] judicial power* and that of the court below by requiring this Court to set aside the judgment of the Court of Claims by dismissing the suit." *Pope* v. *United States*, 323 U.S. 1, 8 (1944) (emphasis added) (explaining *Klein*).

This Court has subsequently clarified that the prohibition of *Klein* "does not take hold when Congress 'amends applicable law.'" *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (alteration omitted) (quoting *Robertson* v. *Seattle Audobon Soc'y*, 503 U.S. 429, 441 (1992)). The key distinction for separation-of-powers purposes is that

Congress may "compel[] changes in law, not findings or results under old law." *Robertson*, 503 U.S. at 438.

In *Robertson*, public interest groups in two separate suits had secured injunctions under various environmental statutes against timber harvesting in forests inhabited by the spotted owl. *Id.* at 432-33. Congress then passed the Northwest Timber Compromise ("NTC"), which provided that "'management of areas according to" its terms met "the statutory requirements that are the basis for'" the two injunctions. *Id.* at 437. This Court found no violation of the *Klein* rule because the NTC had "modified the old provisions" of existing law governing forward-looking relief. *Id.* at 438. *Robertson* thus confirms that Congress may intervene to change the results in pending cases, but only by "'prescrib[ing] general rules for the government of society'" rather than dictating the outcome of a single pending case. See *Brown*, 381 U.S. at 446.

The reason for this rule is simple. When Congress legislates for the generality of cases, it can be expected to act cautiously to ensure that the general public interest is being properly balanced and protected. When Congress adopts a rule for a single pending adjudication involving particular private parties and a very different rule for future disputes, in contrast, the inherent check on abuse is eliminated. *Klein* and its progeny eliminate that risk by depriving Congress of that power.

B. Section 4412(b)(1), By Prescribing A Remedy Rule For This Single Case Different From The Rule Applicable To All Other TAPS Quality Bank Refund Proceedings, Violates The Separation Of Powers.

Section 4412(b)(1) does not amend applicable law; instead, it impermissibly directs results in a single pending adjudication under old law – *i.e.*, it limits the refunds that the Commission could award the private parties to this particular case only. Section 4412(b)(1) is thus a straightforward violation of the rule of *Klein*. This is not a circumstance where Congress amended the law governing the Commission's refund power and the tribunal simply applied the new law to a matter pending before it. Here, Congress *did* amend the generally applicable law governing refunds in section 4412(b)(2), but did not make that new law applicable to this case.

Were it applied to this case, the rule of section 4412(b)(2) would allow full refunds to ExxonMobil back to 1993. Section 4412(b)(2) provides that the Commission may order refunds to shippers for any period from the final lawful just-and-reasonable order to a date 15 months before the Commission's first adjustment order. Here, the Commission's first order adjusting valuations was issued on November 30, 1993. So, under the section 4412(b)(2) rule, refunds could have been ordered back to September 1992 (if otherwise permitted by law). Section 4412(b)(2) imposes no cap based on the number of years between the final and the first adjustment order, nor does it limit the refunds where proceedings have been protracted by repeated judicial reversal of the Commission. Congress dictated that result for this

case alone, by operation of the special rule of section 4412(b)(1).

Rather than confronting the difficult separation-of-powers issues this extraordinary legislation presents, the D.C. Circuit stated that its prior precedent in *National Coalition* required that the legislation be upheld. App. 4a. The reasoning of the court of appeals is unsound. In *National Coalition*, after interest groups had filed a lawsuit challenging federal agencies' plans for constructing a World War II Memorial on the National Mall, Congress passed a law altering the legal requirements for the Memorial and barring judicial review. 269 F.3d at 1093-94. Even though the legislation affected only the Memorial, the D.C. Circuit reasoned that Congress had the "power to address a specific problem," and accordingly "s[aw] no reason why the specificity should suddenly become fatal merely because there happened to be a pending lawsuit." *Id.* at 1097.

The problem with the panel's reliance on *National Coalition* is that that decision is perfectly reconcilable with the rule of *Klein*, but does not remotely support the constitutionality of section 4412(b)(1) of SAFETEA-LU. First, the issue in *National Coalition* was prospective in nature; it was to determine whether the agency could lawfully go forward to build the World War II Memorial on the terms that the agency proposed. Congress had unquestionable power to regulate the Memorial's construction even after the agency had acted, and a private party's filing of a lawsuit could not deprive Congress of that power. That conclusion follows from this Court's decision in *Miller* v. *French*, 530 U.S. 327, 347 (2000), which held that legislation that overturns a judicial decree of prospective relief does not offend the separation of powers.

Second, Congress may always legislate regarding "a *legitimate* class of one" where such a class exists, *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S 425, 472 (1977) (emphasis added), and the Memorial was a "unique public amenity." *Nat'l Coal.*, 269 F.3d at 1097. A law is generally applicable even if it affects a class of one or a few, and Congress was not disabled from addressing the issues relating to the Memorial simply because it was unique.

Here, there is no legitimate class of one; the class is TAPS Quality Bank adjustment proceedings. Congress has the power to legislate regarding the Commission's refund power in all such proceedings and to apply that law retroactively as well as prospectively. If Congress had simply capped or extinguished the Commission's refund power for all TAPS Quality Bank proceedings generally, and made that rule applicable to this case, ExxonMobil would have no separation-of-powers claim. But a law that does not legislate for the relevant class of cases, and simply dictates the remedy in a single case in the class and does not apply that rule in the future, is precisely the kind of congressional exercise of judicial power that violates *Klein*. Cf. *Hurtado* v. *California*, 110 U.S. 516, 535 (1884) ("Law . . . . must be not a special rule for a particular person or a particular case . . . .").

The court below disregarded these distinctions, and thus announced a rule of unprecedented sweep that applies not only to agency adjudications, but also to any adjudication in court (since *National Coalition* itself addressed separation of powers vis-à-vis Article III courts). Under the decision below, Congress has unbridled power to intervene in any single case to dictate the retrospective monetary relief to be paid by one private party to another.

Nor can section 4412(b)(1) be defended as having a rational basis. "Robbing Peter to pay Paul" has never been a rational "policy meriting judicial favor," *Mickel-Hopkins, Inc.* v. *Frassinetti*, 278 F.2d 301, 306 (4th Cir. 1960), and the justification for the legislation conjured up by the D.C. Circuit – "that limiting the retroactivity of refunds would help provide certainty to parties affected by FERC's decision," App. 4a – simply ignores reality. Only section 4412(b)(2) could affect prospective decisions of the refiners and shippers because only that provision applies to transactions after the Act's effective date. And in any event, the primary beneficiary of section 4412(b)(1) no longer even operates in Alaska and thus could not benefit from any "certainty" the legislation provided. See *supra* at 3 & n.1. There was accordingly no basis, let alone a rational one, for legislation that served principally to transfer money from one private party to another. Cf. *Kelo* v. *City of New London*, 545 U.S. 469, 477 (2005) ("[T]he sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*."); *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (not "a rightful exercise of legislative authority" to pass "a law that takes property from A. and gives it to B").

At bottom, Congress here deprived ExxonMobil of retrospective compensation for the Quality Bank's underpayments to ExxonMobil for its Alaska crude streams dating back to 1993. If Congress has the power to do that, a defendant can use its influence (legitimate or otherwise) in Congress to secure legislation that would limit the amount of economic or noneconomic damages that a court could award to a specific, badly injured plaintiff in a single pending case, without amending the laws governing damages

generally. Or a politically powerful employer could obtain legislation to limit back pay to victimized employees (or a class of employees) in a single unfair labor practice proceeding before the National Labor Relations Board, or in a single pending Title VII employment discrimination case in federal court, without amending the law governing back pay generally.

The decision below eviscerates *Klein*; if it is allowed to stand, there is no limit on congressional power to have any individual judicial case among private parties decided as Congress wishes. It is a fundamental principle that every party in an adjudication stands before the court or agency as equal, and the Constitution leaves no room for the politicization of inherently judicial disputes over the monetary compensation one private party owes to another. It corrupts the adjudicatory process if any dissatisfied litigant can instead have the issue of retrospective liability or monetary relief decided politically by Congress. Justice Powell's words ring true here:

> Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights. The only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to "the tyranny of a shifting majority."

INS v. *Chadha*, 462 U.S. 919, 966 (1983) (Powell, J., concurring) (footnote omitted). Contrary to the

statement of one Alaska senator, App. 204a, there was nothing "broken" about the process of Commission adjudication and judicial review by Article III courts. Congress – more specifically, the Alaska congressional delegation – just disliked the results. But that does not give Congress the power to limit the retrospective remedy that a court or agency may award to private parties in a single pending case under existing law.

II. THE D.C. CIRCUIT'S READING OF *KLEIN* CONFLICTS WITH THAT OF OTHER COURTS AND PRESENTS A RECURRING ISSUE OF NATIONAL IMPORTANCE.

In extending *National Coalition* to legislation that affects the availability of retrospective relief only in a single pending case, the decision below confirms the D.C. Circuit's departure not only from this Court's separation-of-powers precedents, but also from the sound reading of *Klein* adopted by other circuits. As explained above, the D.C. Circuit here refused to read *Klein* as prohibiting Congress from "changing the rule of decision in a pending case," and rebuffed the argument that the statute in *National Coalition* was unconstitutional because it targeted only the construction of a single monument and one pending lawsuit. 269 F.3d at 1096-97.

This narrow interpretation conflicts with the manner in which other lower courts have correctly construed *Klein*. The Seventh Circuit's decision in *Lindh* v. *Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997), is illustrative. Writing for the en banc court in *Lindh*, Judge Easterbrook summarized the *Klein* line of cases as recognizing Congress's power to "make rules that affect classes of cases." *Id.* at 872. But Congress cannot, he continued, "tell courts how to decide a

particular case." *Id.* Thus, while it may "prescribe maximum damages for categories of cases, or provide that victims of torts by federal employees cannot receive punitive damages," Congress "cannot say that a court must award Jones $35,000 for being run over by a postal truck." *Id.* (citations omitted).

The *Lindh* court's reading of *Klein* has been echoed by other circuits, creating a breach between the D.C. Circuit and various regional courts of appeals on a critical – and recurring – constitutional question. See *Crater* v. *Galaza*, 491 F.3d 1119, 1128 (9th Cir. 2007) (under *Klein* "Congress may not predetermine the results in any given case"), *cert. denied*, 128 S. Ct. 2961 (2008); *Green* v. *French*, 143 F.3d 865, 874 (4th Cir. 1998) (Luttig, J.) (statute was constitutional under *Klein* and its progeny in part because Congress had not "mandated a particular result in any pending case"), *abrogated on other grounds by Williams* v. *Taylor*, 529 U.S. 362 (2000); see also *Shawnee Tribe* v. *United States*, 423 F.3d 1204, 1217-18 (10th Cir. 2005) (recognizing that "Congress cannot dictate findings or command specific results in pending cases," and upholding statute that "itself purports neither to compel a particular decision in the case before [the court] nor to decide how the law applies to our specific facts").

That the lower courts have divided over *Klein*'s ultimate import is not, however, surprising. *Klein* is "a notoriously difficult decision to interpret," *Biodiversity Assocs.* v. *Cables*, 357 F.3d 1152, 1170 (10th Cir. 2004) (McConnell, J.), and has been recognized as "a puzzling case," William D. Araiza, *The Trouble With* Robertson*: Equal Protection, The Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 Cath. U. L. Rev. 1055, 1074 (1999). See generally Richard H.

Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 99-100 & nn.4-5 (5th ed. 2003) (chronicling varying interpretations of *Klein* and scholarly treatment of the case). This Court's more recent decisions construing *Klein* have fueled rather than quelled the interpretive fire. Indeed, while appearing in one breath to cabin *Klein*'s reach in *Plaut*, the Court just two months later cited with approval *Klein*'s rule-of-decision principle in holding that Congress lacked the authority to "instruct[] a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate." *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 430 (1995).

Lower court judges have understandably viewed the language in *Lamagno* as a signal that *Klein*'s core principle remains intact and has not been, as the D.C. Circuit effectively held here, gutted by subsequent decisions. See, *e.g.*, *Crater* v. *Galaza*, 508 F.3d 1261, 1264 (9th Cir. 2007) (opinion of five judges dissenting from denial of rehearing en banc), *cert. denied*, 128 S. Ct. 2961 (2008).

Nor are the questions about *Klein* going away on their own. To the contrary, *Klein*-based challenges have remained abundant in recent years. *Klein* has been at the center of various circuit decisions on the constitutionality of a provision in the Antiterrorism and Effective Death Penalty Act of 1996 that limits the circumstances under which federal courts may grant habeas corpus relief to prisoners in state custody. See, *e.g.*, *Evans* v. *Thompson*, 518 F.3d 1, 9 (1st Cir. 2008), *petition for cert. filed*, No. 08-5370 (U.S. July 14, 2008); *Crater*, 491 F.3d at 1128; *Lindh*, 96 F.3d at 872. It also played a key role in the litigation involving Congress's widely publicized effort to provide a federal forum for the parents of

Terri Schiavo to seek relief from adverse state-court rulings. Compare *Schiavo ex rel. Schindler* v. *Schiavo*, 404 F.3d 1270, 1274 (11th Cir. 2005) (en banc) (Birch, J., specially concurring) (legislation unconstitutional under *Klein*), with *id.* at 1281-82 (Tjoflat, J., dissenting from denial of rehearing en banc) (finding no constitutional infirmity). And *Klein* has recently been invoked in challenges to the Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005), a federal statute requiring the dismissal of certain high-profile lawsuits against firearms manufacturers. See *City of New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 395 (2d Cir. 2008); *Dist. of Columbia* v. *Beretta U.S.A. Corp.*, 940 A.2d 163, 172-73 (D.C. 2008). These cases have presented serious, hotly contested issues and have often produced impassioned dissents. See *Evans* v. *Thompson*, 524 F.3d 1, 2 (1st Cir. 2008) (Lipez, J., joined by Torruella, J., dissenting from denial of rehearing en banc), *petition for cert. filed*, No. 08-5370 (U.S. July 14, 2008); *Crater*, 508 F.3d at 1261 (Reinhardt, J., joined by Pregerson, Gould, Paez, and Berzon, JJ., dissenting from denial of rehearing en banc); *Davis* v. *Straub*, 445 F.3d 908, 911 (6th Cir. 2006) (Martin, J., joined by Daughtrey, Moore, Cole, and Clay, JJ., dissenting from denial of rehearing en banc), *cert. denied*, 127 S. Ct. 929 (2008).

In short, the D.C. Circuit's reading of *Klein* is in sharp tension, if not outright conflict, with that of other circuits. What is more, the meaning of *Klein* has been and remains a matter of raging dispute. If *Klein* is no longer good law, then this Court should preside over its burial. If its rule has any vitality, then section 4412(b)(1) of SAFETEA-LU violates the separation-of-powers principles deeply embedded in

the Constitution. In either case, the D.C. Circuit's resolution of this recurring constitutional issue of national importance warrants this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 18, 2008

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

Nos. 06-1166, 06-1176, 06-1177, 06-1183, 06-1187, 06-1210, 06-1271, 06-1280.

PETRO STAR INC.,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

TESORO ALASKA COMPANY, *et al.*,
Intervenors.

March 6, 2008
Rehearing En Banc Denied May 20, 2008

On Petitions for Review of an Order of the Federal Energy Regulatory Commission

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JUDGMENT

Before: SENTELLE, *Chief Judge*, and RANDOLPH and TATEL, *Circuit Judges*.

This case was considered on the record from the Federal Energy Regulatory Commission and on the briefs and arguments of the parties. It is ORDERED AND ADJUDGED that the petitions are denied. This case is the fourth in a series relating to FERC's

regulation of the Trans Alaska Pipeline System (TAPS). *See OXY USA, Inc. v. FERC,* 64 F.3d 679 (D.C.Cir.1995); *Exxon Co. v. FERC,* 182 F.3d 30 (D.C.Cir.1999); *Tesoro Alaska Petroleum Co. v. FERC,* 234 F.3d 1286 (D.C.Cir.2000). Numerous petitioners raise challenges to FERC's decision in this proceeding, but all lack merit.

First, BP and other petitioners argue that the value FERC assigned to resid—the component of oil that remains when all others have been boiled off—is arbitrary and capricious. Specifically, the petitioners allege that FERC erred by approving a formula for estimating resid's refining costs without ever totaling up what cost the formula would lead to or ensuring that it was just and reasonable. This objection fails because "the Commission 'need not confine rates to specific, absolute numbers but may approve a tariff containing a rate formula' or a rate rule.'" *Public Utilities Comm'n of State of California v. FERC,* 254 F.3d 250, 254 (D.C.Cir.2001) (quoting *Transwestern Pipeline Co. v. FERC,* 897 F.2d 570, 578 (D.C.Cir.1990)). Moreover, the Commission specifically found that the formula it adopted was just and reasonable "and [that] the resulting resid value is just and reasonable." *Trans Alaska Pipeline System,* 113 F.E.R.C. ¶ 61,062 at 61,182 (2005). Petitioners also claim that the resid value FERC settled on was outside the "zone of reasonableness" because the estimate of refining costs FERC used was higher than anything supported by the record. But the refining costs FERC estimated were well within the range demonstrated in exhibit PAI-10. Petitioners argue that PAI-10 was unreliable, but their expert prepared PAI-10 and relied on it heavily, and a party cannot "argue that the Commission was wrong to rely

on evidence [the party] put before it." *Consolidated Rail Corp. v. ICC,* 29 F.3d 706, 714 (D.C.Cir.1994).

Continuing their assault on FERC's resid valuation, petitioners say FERC double counted certain refining costs by adding the cost of some refining machinery to an estimate that already included it. As FERC explained, however, the cost estimate to which it added these costs specifically excluded the items FERC added, so there was no double counting. Also, while petitioners object to FERC's estimate of refineries' indirect costs, their expert witness was the one who proposed the formula FERC used, and substantial evidence supports the total indirect costs FERC predicted. Similarly without merit is petitioners' objection that FERC should have ignored the shipping and handling costs of the resid byproduct coke when estimating resid's value. Although FERC ignored the shipping and handling costs of most oil components, it explained that the costs of shipping and handling coke are dramatically higher relative to its value than are those of any other oil product, making it perfectly reasonable for FERC to treat coke differently. As to petitioners' argument that FERC should have ignored two tests estimating the resid content of Alaskan oil because the test results were slightly outside the range of other tests, the difference was minimal, petitioners pointed to no flaws in the testing methodology, and this is exactly the type of expert judgment about which we defer to FERC. *See Ass'n of Oil Pipe Lines v. FERC,* 83 F.3d 1424, 1445 (D.C.Cir.1996) ("Because the Commission's analysis required a high level of technical expertise, the court owes deference to the Commission's informed and rationally exercised discretion."). Petitioners' final argument about resid valuation—that FERC should have applied its new resid valuation

retroactively only to 2004 because before that no one would have processed resid in the way FERC suggested—is belied by substantial record evidence indicating that many refineries operated before 2004 as FERC proposed.

Second, ExxonMobil and ConocoPhillips argue that section 4412(b)(1) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA), Pub.L. No. 109-59, 119 Stat. 1144, 1778 (2005), which prohibited FERC from making its resid price valuation retroactive to any period before February 1, 2000, is unconstitutional. Specifically, they claim section 4412(b)(1) not only violates the Constitution's due process and equal protection guarantees, but also violates separation of powers by interfering with a pending adjudication, i.e., it reversed the administrative law judge's decision in this matter to make FERC's resid price retroactive to 1993. As to the first argument, because section 4412(b)(1) neither infringes a fundamental right nor draws a suspect classification, it "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for" it. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). This standard is plainly satisfied, for Congress could easily have concluded that limiting the retroactivity of refunds would help provide certainty to parties affected by FERC's decision. As to petitioners' separation of powers argument, any claim that Congress's decision here unconstitutionally exercised judicial power is foreclosed by our decision in *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C.Cir.2001).

Third, ExxonMobil and ConocoPhillips challenge FERC's decision to calculate the resid cut's retroactive value by using the new West Coast rates for naphtha and VGO. Because the filed rate doctrine bars FERC from retroactively applying the new West Coast rates to the "straight-run" naphtha and VGO cuts, the petitioners argue that the filed rate doctrine also bars FERC from retroactively applying the new West Coast rates to the "coker" naphtha and VGO derived from coking resid and used to calculate resid's value. But no application of the filed rate doctrine prevents the retroactive use of straight-run naphtha and VGO rates as part of the formula for valuing the coker naphtha and VGO components of an entirely different product, resid. Alternatively, the petitioners argue that FERC's decision was arbitrary and capricious because the Quality Bank methodology is "designed to use the *same* price for [n]aphtha and VGO" for straight-run naphtha and VGO and coker naphtha and VGO. Pet'rs' Opening Br. 39-40. FERC, however, reasonably interpreted the parties' October 3, 2002 stipulation as permitting retroactive application for purposes of calculating resid's value because the parties agreed that once disputes "as to the Quality Bank values to be used for certain of the cuts . . . are resolved, the resulting values should be used for valuing [r]esid." Joint Stip. of the Parties 2 n. 2 (Oct. 3, 2002); *see also Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1550 (D.C.Cir.1993) (deferring to FERC's reasonable interpretation of stipulations).

Fourth, Petro Star and Williams challenge FERC's 2003 decision to value Gulf Coast naphtha by averaging two different prices of naphtha published by the Platts Oilgram Price Report. After the report switched from publishing one naphtha price to publishing two different prices depending on the size of

the transaction, FERC concluded that the product prices had been "radically altered" and decided to average the two prices. *Trans Alaska Pipeline System*, 104 F.E.R.C. ¶ 61,201 at 61,705-06 (2003). Petitioners have failed to show that this decision was arbitrary and capricious or otherwise unsupported by substantial evidence. Alternatively, petitioners argue that because the parties stipulated that changes in naphtha and VGO rates should have the same effective date, VGO's new West Coast rate should apply retroactively to 2003, when the averaged naphtha prices went into effect. The filed rate doctrine, however, bars retroactive application of VGO's new rates. *See, e.g., OXY,* 64 F.3d at 699 ("The [filed rate] doctrine's corollary, applicable here, is the rule that agencies may not alter rates retroactively.").

Fifth, Flint Hills and Petro Star argue that under *Tennessee Valley Municipal Gas Ass'n v. FPC,* 470 F.2d 446 (D.C.Cir.1972), FERC should apply the new West Coast naphtha and VGO rates retroactively for 922 days to account for FERC's improper delay in considering an earlier complaint challenging those rates. In the proceeding before FERC in this case, however, Petro Star opposed such relief under *Tennessee Valley.* In addition, when FERC was considering the earlier complaint, Williams, which at the time owned Flint Hills's Alaskan refinery, urged FERC to dismiss the complaint. No unfairness exists when the complaining parties (or their predecessors) invited the error because FERC's legal error did not "unfairly prolong[ ] th[e] pendency" of those rate determinations. *Tenn. Valley,* 470 F.2d at 453. Although FERC failed to distinguish *Tennessee Valley* on this ground, the *Chenery* doctrine, *SEC v. Chenery,* 318 U.S. 80, 88, 63 S.Ct. 454, 87 L.Ed. 626 (1943), is inapplicable because interpretation of our

precedent is not a matter entrusted to the agency's judgment. *Id.* at 88, 63 S.Ct. 454. Alternatively, petitioners argue that because the parties stipulated in 2002 to new West Coast naphtha and VGO rates, those rates should apply retroactively from the date of the stipulation. But the stipulation expressly disavowed agreement on an effective date, and thus failed to put the parties on notice that any new rates would apply retroactively. *See, e.g., OXY,* 64 F.3d at 699 ("[The filed rate doctrine] does not extend to cases in which customers are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service."(citation omitted)).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing en banc. *See* FED. R.APP. P. 41(b); D.C.CIR. R. 41.

APPENDIX B

FEDERAL ENERGY REGULATORY COMMISSION
Commission Opinions, Orders and Notices

Docket No. OR89-2-019
Docket No. OR96-14-008
Docket No. OR98-24-004
Docket No. IS03-137-003
Docket No. IS03-141-003
Docket No. IS03-142-003
Docket No. IS03-143-003
Docket No. IS03-144-003

TRANS ALASKA PIPELINE SYSTEM
EXXON COMPANY, U.S.A.

v.

AMERADA HESS PIPELINE CORPORATION
TESORO ALASKA PETROLEUM COMPANY

v.

AMERADA HESS PIPELINE CORPORATION
BP PIPELINES (ALASKA), INC.
EXXONMOBIL PIPELINE COMPANY
PHILLIPS TRANSPORTATION ALASKA, INC.
UNOCAL PIPELINE COMPANY
WILLIAMS ALASKA PIPELINE COMPANY, L.L.C.

OPINION NO. 481-B,
ORDER ON REHEARING AND CLARIFICATION
(Issued June 1, 2006)

Before Commissioners: Joseph T. Kelliher, Chairman; Nora Mead Brownell, and Suedeen G. Kelly.

1. On October 20, 2005, the Commission issued Opinion No. 481,[1] an order on the exceptions to the Initial Decision (ID), issued by Administrative Law Judge Edward Silverstein (ALJ).[2] The issue addressed by the Commission was the method of making monetary adjustments among shippers of Alaska North Slope (ANS) oil on the Trans Alaska Pipeline System (TAPS). The adjustments, based upon the value of the "cuts" in the crude oil tendered, are made through a "Quality Bank," which either compensates or charges a shipper for the difference in quality between the crude oil tendered by that shipper and the crude oil received by that shipper. Shippers with lower quality oil pay into the Quality Bank, and shippers with higher quality oil receive payments from the Quality Bank.

2. As a result of court remands, valuation of the Resid cut was an issue set for hearing. Opinion No. 481 affirmed the ALJ's ruling that the new Resid valuation should be applied retroactive to February 1, 2000. Opinion No. 481 also affirmed the ALJ's rulings that there should be new valuations for the West Coast Naphtha and West Coast Vacuum Gas Oil (VGO) cuts, and that the valuations would be prospective. Among the parties requesting rehearing of Opinion No. 481 were Petro Star, Inc., and the TAPS Carriers. In its request for rehearing, Petro Star contended that new West Coast valuations for VGO and Naphtha must be used when valuing Resid for the retroactive period. The TAPS Carriers re-

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[1] *Trans Alaska Pipeline System*, 113 FERC ¶ 61,062 (2005).

[2] *Trans Alaska Pipeline System*, 108 FERC ¶ 63,030 (2004).

quested that the Commission specify what costs should be used in certain calculations valuing the cuts.[3]

3. On March 29, 2006, the Commission issued Opinion No. 481-A,[4] which granted rehearing in part, denied rehearing in part, and granted clarification as to certain issues. Opinion No. 481-A affirmed the rulings that the new valuations for the West Coast Naphtha and VGO cuts will be applied on a prospective basis. However, it granted Petro Star's request that from October 3, 2002, the new valuations for these cuts as coker products should be used when calculating the retroactive value for West Coast Resid.

4. ExxonMobil Company and Tesoro Alaska Company (EM/T) and ConocoPhillips Alaska, Inc. (Conoco) seek rehearing asserting that the new valuations for the West Coast Naphtha and VGO cuts can only be applied prospectively.[5] The TAPS Carriers also filed a renewed request for rehearing of Opinion No. 481-A seeking further clarification regarding a certain cost issue that was not addressed in Opinion No. 481-A. This order grants the TAPS Carriers' request and specifies what cost figure should be used, and denies the requests for rehearing.[6]

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[3] Conoco and jointly ExxonMobil Corporation and Tesoro Alaska Company (EM/T) filed answers to the TAPS Carriers' request. In their answers they included figures for the costs that should be used in the Quality Bank cut calculations.

[4] *Trans Alaska Pipeline System*, 114 FERC ¶ 61,323 (2006).

[5] Conoco both supports and adopts EM/T's contentions. This order refers to EM/T's arguments.

[6] Union Oil Company of California and OXY USA Inc. jointly filed a request for rehearing of Opinion No. 481-A. They state that Opinion No. 481-A denied the request for rehearing filed by

I. *The TAPS Carriers' Request for Clarification*

A. *Background*

5. In Opinion No. 481, the Commission affirmed the ALJ's method for determining typical coking costs, which in turn, would be used to determine the value of Resid, one of the "cuts" in the crude oil tendered, subject to one modification regarding deheading equipment. Specifically, the Commission stated that:

> Therefore, we agree that deheading equipment should be added to the ISBL estimate. We disagree, however, on the ALJ's adoption of Jenkins's position that a refinery would probably include automatic deheading equipment for both the top and the bottom heads simply because the incremental cost was low. As Jenkins admitted, the preponderance of automatic deheading systems are bottom systems and not top systems. There-

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BP Exploration (Alaska), Inc. (BP) that the Commission had failed to calculate the end result of the Resid value, and had failed to compare that result to the overall zone of reasonableness for the actual value of Resid established by the record in this case. In their request, at 2, they state that the Commission erred "in denying the request for rehearing of BP regarding the Commissions' failure to make a ruling on the overall justness and reasonableness of the Resid valuation." Since the request merely argues that the denial of rehearing was error, we reject it as improper under the Commission's Rules and Regulations. Rehearing of an order on rehearing lies only when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection. *Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999) (*citing Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109-10 (D.C. Cir. 1988)). *See also Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 423-24 (1st Cir. 2001).

fore, we find that a typical coker would only have bottom automatic deheading equipment.[7]

6. In response to the TAPS Carriers' clarification request relating to coker costs the Commission stated that: "[A]s the ALJ found that O'Brien's cost curve should be used to value Resid, we clarify that the TAPS Carriers must use this approach *along with O'Brien's cost figures* unless the ALJ specifically referenced otherwise, *e.g.*, adopted Jenkins's estimate for a specific cost."[8]

B. *Request for Rehearing*

7. TAPS Carriers state that in Opinion No. 481-A the Commission addressed their prior request for clarification, but did not address one issue. That issue is what cost should be used for automatic bottom deheading equipment in the calculation of coker capital costs used to determine the value of the Resid cut. They explain that neither Opinion No. 481 nor 481-A specified what cost should be used for automatic bottom deheading equipment, and that the record contains several cost figures that might be used. The TAPS Carriers state that they take no position on what that amount should be since they function as neutral stakeholders with respect to the Quality Bank.[9] They state that until that amount is set, they cannot implement the methodology the Commission has prescribed for calculating the Quality Bank payments and receipts.

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[7] Opinion No. 481 at P 35 (footnote omitted).

[8] *Id.* at P 50 (emphasis added).

[9] The TAPS Carriers state that their role is simply to administer the Quality Bank in compliance with the Commission's orders through the independent Quality Bank Administrator.

8. ConocoPhillips Alaska, Inc. (Conoco), Williams Alaska Petroleum Inc. (Williams), and jointly BP Exploration (Alaska) Inc and BP America Production Company filed answers to the TAPS Carriers' request.

C. *Discussion*

9. The TAPS Carriers are correct that neither Opinion Nos. 481 and 481-A, nor the ID made a finding as to the cost of bottom automatic deheading equipment. Moreover, upon further review of the record in this proceeding, we find that Mr. O'Brien, whose costs are to be used for the capital costs unless otherwise stated by the ALJ, did not file testimony addressing the cost of automatic deheading equipment. Under these circumstances, we will grant the TAPS Carriers' request and specify the figure to be used for rehearing.

10. Although Mr. O'Brien did not provide the cost of bottom automatic deheading equipment, the record contains several cost estimates. One cost estimate, presented by Eight Parties, is $2,616,810 (in 2000 dollars) which was the amount of a proposal for a Hahn & Clay automatic bottom deheading system for the BP Carson Refinery in California.[10] A second estimate, presented by EM/T, is $5.7 million (in 2000

[10] Exhibit No. WAP-84. The vendor quote is for a Hahn & Clay automatic deheading device installed on a six-drum coker in 1993. The estimate included base costs, installation costs and indirect costs (using Jenkins's assumptions of installed cost times the "California Factors") of $3,335,173. The total of this quote was then adjusted to $2,223,449 to represent a four-drum system (2/3 of the 1993 estimate), and then adjusted to year 2000 dollars using the Nelson Farrar Index to arrive at the Hahn & Clay estimate of $2,616,810 ($2,223,449 times (1542.7/1310.8)).

dollars) which is the Hahn and Clay vendor quote adjusted to include an installation cost of 119 percent of the base cost.[11] The third estimate, which was presented by Eight Parties but supported by EM/T, is $8,989,303 (in 2000 dollars) based on EM/T witness Jenkins's cost estimate of $4.1 million for the bare equipment cost of four automatic bottom deheaders multiplied by 119 percent for installation costs.[12]

11. We reject the estimate based on EM/T witness Jenkins's cost estimates because the ALJ rejected Jenkins's detailed cost estimate as not "objective or accurate enough."[13] Moreover, it appears that the Hahn & Clay estimate already includes installation costs[14] making EM/T's additional 119 percent inappropriate. We find that the Hahn & Clay $2,616,810 estimate for bottom deheading equipment to be just and reasonable. Therefore, we clarify that the TAPS Carriers should use the $2,616,810 figure for the cost of bottom deheading equipment.

II. *West Coast Valuations Naphtha and VGO in the Retroactive Resid Valuation*

A. *Background*

12. Valuation of the Resid cut was an issue set for hearing. The ALJ and the Commission accepted the parties' Joint Stipulation providing that Resid would be valued as a coker feedstock methodology.[15] Under

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[11] EM/T Reply Brief at 82 n. 43 (November 19, 2003).

[12] Eight Parties Initial Post-Hearing Brief at 73 (September 12, 2003).

[13] ID at P 1184

[14] *See* Exhibit No. WAP-84.

[15] The stipulation is set forth in the ID, 108 FERC ¶ 63,030 at P 25.

that methodology a "before cost" value of Resid is calculated as the weighted average value of products into which Resid is made when it is processed through a coker, and then processing costs are subtracted to arrive at a final value. The ID held that "the Parties appear to agree that West Coast Resid should be valued on a West Coast basis."[16] Opinion No. 481 affirmed the ALJ's ruling that the new Resid valuation should be applied on a retroactive basis to February 1, 2000.

13. Thus, the value of West Coast Naphtha and West Coast VGO affect valuation of West Coast Resid, and the valuations of both West Coast Naphtha and VGO were issues at the hearing. In 1994 the Commission directed that the Gulf Coast Naphtha price should be used to value the Naphtha cuts on both the Gulf Coast and West Coast because there was no published Naphtha price on the West Coast. In *Tesoro*[17] the Court held that parties were entitled to a ruling on whether circumstances had changed so that this should no longer apply.

14. In the TAPS ID, the ALJ found that the use of the Gulf Coast Naphtha price assessment to value the Naphtha cut on the West Coast was not just and reasonable, and concluded that the Tallett methodology should be used to value West Coast Naphtha. He also held that the new valuation should be applied prospectively.[18] Opinion No. 481 affirmed both rulings.

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[16] *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286(1) (D.C. Cir. 2000).

[17] *Id.* at P 1234.

[18] *See* 108 FERC at 65,606 P 2730. Tallett's regression formula establishes relationships between Gulf Coast Naphtha's value as a feedstock and the prices of end-products derived from

15. The Commission had also previously held that the Gulf Coast price for high sulfur VGO would be the reference price for both the Gulf Coast and the West Coast because of concern that the West Coast price was thinly traded, and was thus subject to manipulation. In *Tesoro* the Court held that this issue should be considered again by the Commission. Accordingly, valuation of West Coast VGO was an issue at the hearing.

16. The parties, in an October 3, 2002 Stipulation,[19] stipulated that the West Coast VGO should be valued on the basis of the OPIS West Coast High Sulfur VGO weekly price, but disagreed as to the effective date. The ALJ held that West Coast VGO would be valued using the OPIS West Coast High Sulfur VGO weekly price on a prospective basis.[20] Opinion No. 481 affirmed both rulings.

17. In its request for rehearing of Opinion No. 481, Petro Star contended that West Coast valuations for VGO and Naphtha must be used within the coker feedstock methodology retroactively so that Resid will not be undervalued relative to other cuts. It argued

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it, namely gasoline and jet fuel. Those relationships and West Coast prices are then used for those same end-products to calculate the value of West Coast Naphtha. *Id.* at P 459-531.

[19] The stipulation provided:

1. West Coast VGO shall be valued based on the published OPIS West Coast High Sulfur VGO weekly price.

2. The Parties disagree as to the effective date of the new West Coast VGO value. However, the Parties agree that if a different West Coast Naphtha valuation methodology is adopted in this proceeding, it and the new West Coast VGO value should have the same effective date.

[20] ID at PP 2767 and 2770.

that to prescribe Gulf Coast-based valuations for the coker VGO and coker Naphtha components which the record evidence had demonstrated are inaccurate, would render the Resid valuation unjust and unreasonable. Petro Star asserted that the new value should be used in calculation from October 3, 2002, the date the parties stipulated the value of these cuts.

18. Among other things, Opinion No. 481-A affirmed the rulings that the new valuations for the West Coast Naphtha and VGO cuts will be applied on a prospective basis. However, it granted Petro Star's request that from October 3, 2002, the new valuations for these cuts as coker products should be used when calculating the retroactive value for West Coast Resid because "using the new valuations more accurately reflects the value of Resid."[21]

B. *Requests for Rehearing and Answer*

19. In their requests for rehearing EM/T and Conoco assert that the new valuations for the West Coast Naphtha and VGO cuts can only be applied prospectively.[22] Further they assert that the stipulation regarding the Resid valuation specifically requires the existing Quality Bank values for these cuts to be used and the new valuation of West Coast Naphtha and VGO to be applied on a prospective basis. Moreover, they argue, the October 3, 2002 stipulation, referred to in Opinion No. 481-A, did not stipulate the values of the West Coast Naphtha and VGO cuts as of October 3, 2002. In fact, they contend, use of the new values to value the West Coast Resid

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[21] 114 FERC ¶ 61,323 P 49.

[22] Conoco both supports and adopts EM/T's contentions. This order refers to EM/T's arguments.

would violate the filed rate doctrine because the new values for West Coast Naphtha and VGO became effective only when the Commission issued Opinion No. 481. Petro Star moved for leave to answer, together with an answer.[23]

C. *Discussion*

20. Parties whose crude contains little Resid seek to have the Resid cut valued as low as possible. As a result of Opinion No. 481, which applies the new Resid valuation retroactive to October 1, 2000, those parties benefit because the new valuation yields a lower value for the Resid cut than its valuation under the prior method. In addition, Petro Star asserted that "VGO and Naphtha comprise almost half the products made when Resid is processed as a coker feedstock. . . . If their values are too low, Resid values also will be too low."[24] The new valuations for West Coast Naphtha and West Coast VGO yield a higher value for these products than when the Gulf Coast prices were used to value the West Coast products. Thus, to use the Gulf Coast prices for the West Coast products for the retroactive Resid period will benefit those parties whose crude contains lesser amounts of Resid.

21. The purpose of retroactive application of the new Resid valuation was in recognition of the Court's ruling in *Exxon*,[25] that retroactivity is favored because it "would make the parties whole," and prevent

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[23] The Commission grants the motion since it provided information helpful in the disposition of the issue.

[24] Petro Star November 21, 2005 request for rehearing at 15-16.

[25] *Exxon Company, U.S.A. v. FERC*, 182 F.3d 30 (D.C. Cir. 1999).

some parties "divvy[ing] up a windfall at the expense of [other] parties," 182 F.3d at 49-50. But what would make the parties whole where the value of the Resid cut is to be determined on a retroactive basis, when that value is based on the value of products whose Quality Bank value the evidence established was not just and reasonable. Opinion No. 481-A reached the fair result, namely, that while the value of the Resid cut would be recalculated back to February 1, 2000, in calculating that value the value of cuts produced from the Resid, which had been challenged and held to no longer be just and reasonable, should not be used for the entire period. In determining when use of the new just and reasonable values should begin, Opinion No. 481 made reference to the parties' October 3, 2002 Joint Stipulation.

22. EM/T assert that the Commission erred in reaching its conclusion that the new value for West Coast Naphtha and VGO should be used in the coker calculation back to October 3, 2002 "as the date the parties stipulated the value of those cuts" because that stipulation does not so provide.

23. EM/T is correct that the October 3, 2002 stipulation did not establish an agreed-upon Naphtha price. The stipulation did provide for an agreed-upon West Coast VGO price. Moreover, the stipulation provided that if a new West Coast Naphtha valuation methodology was adopted for West Coast Naphtha, then the new values for both Naphtha and VGO "should have the same effective date." What the Commission was addressing was how to value the Resid on a retroactive basis, where its value was determined in part by the value of cuts whose valuations had been challenged as not just and reasonable. The ALJ, and Opinion No. 481, held that those valuations

could no longer continue, and for purposes of their valuations as cuts under the distillation methodology, the new values would be applied prospectively. However, in recalculating the value of the Resid cut retroactively, to reach the result the Court directed, "to make parties whole," Opinion No. 481-A concluded that the new values should be used.

24. The question presented then was the date from which the new values should be used. The October 3, 2002 stipulation set the new valuation reference price for West Coast VGO, namely, "the published OPIS West Coast High Sulfur VGO weekly price." The ALJ had also ruled that the Tallett Methodology should be used for valuing West Coast Naphtha, because using the Gulf Coast Naphtha price was not just and reasonable. Since the evidence on this issue related to the period before October 3, 2002, and the stipulation had provided for the same effective date for the new valuation of West Coast Naphtha and VGO, the October 3, 2002 date was an appropriate and reasonable date from which to commence the new valuation. In fact, EM/T had argued for a March 1, 2003 effective date for the new value of West Coast VGO because "the parties have stipulated that the effective date for any new Naphtha value and the agreed upon VGO value should be the same."[26] Thus, Opinion No. 481-A held that October 3, 2002 was the date from which the new values would be used for this limited purpose.

25. EM/T also argues that the Commission ignored the parties' stipulation as to how the Resid would be valued. EM/T cites to that part of the stipulation that provided that

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[26] 108 FERC ¶ 63,030 P 2768.

> (B) Second, values are determined for each of the nine Coker products. For all of the coker products except Fuel Gas and Coke, the Quality Bank value for that product is to be used. . . . [27]

26. EM/T contends that since the Commission held that the new West Coast Naphtha and VGO valuation would be applied prospectively, under the stipulation, those values could not be applied to the retroactive Resid period.

27. However, EM/T ignores that appended to the stipulation was a footnote which stated:

> There are disputes among the parties as to the Quality Bank values to be used for certain of the cuts, but the parties agree that once these disputes are resolved, *the resulting value should be used for valuing Resid, (emphasis added).*[28]

Having found that use of the Gulf Coast prices for the West Coast Naphtha and VGO was not just and reasonable, it is reasonable and appropriate to use the new value for the retroactive valuation of the Resid cut, even if the new valuation of the West Coast Naphtha and VGO cuts, as cuts in themselves, would be applied prospectively. If the Resid cut's value was to be recalculated for the retroactive period using the new Resid valuation because it was unfair to parties whose crude contained little Resid to use the old valuation, how would it be fair to apply the unjust and unreasonable valuations of cuts produced under the Coker methodology to the retroactive period? Applying the now rejected values for the retroactive period would result in a windfall to some parties,

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[27] 108 FERC ¶ 63,030 P 25.

[28] *Id.* n.10.

contrary to the very purpose of the retroactive application of the new Resid valuation that *Exxon* mandated.

28. EM/T also asserts that the hearing was limited to disputed issues that the Joint Stipulation specified regarding the Resid valuation, and the West Coast Naphtha and VGO valuation were clearly not specified as any of those issues. Because the Joint Stipulation expressly mandated that for all of the products produced by the coking of the Resid cut except Fuel Gas and Coke, "the Quality Bank value for that product is to be used," EM/T argue that the Joint Stipulation mandates that the same values that are used by the Quality Bank to value the Naphtha and VGO cuts as parts of the TAPS streams must also be used to value the Naphtha and VGO that is produced by the coking of the Resid cut. However, this is simply the same argument discussed above in different words, and we reject the argument for the same reason.

29. Another argument advanced by EM/T is that the Commission erred in agreeing that Petro Star's proposal will "more accurately reflect the value of the Resid" cut over the period from October 3, 2002, to November 1, 2005. That, they argue, is contrary to the Commission's own findings in this case, referring to the Commission's discussion of why those cuts' new values would be applied prospectively when valued as parts of the TAPS stream under the distillation methodology.

30. However, in Opinion No. 481-A, the Commission was faced with the question of what valuations for West Coast coker VGO and coker Naphtha would yield the most empirically accurate West Coast Resid value, and held that the new valuations, from Octo-

ber 3, 2002, would yield that result. This is a question different from whether there was any basis on which the new values for those cuts, as one of the cuts under the distillation methodology, could be applied retroactively in light of the status of the existing Quality Bank values for those cuts as the legal rate. That the Commission concluded there was no basis for doing so in that situation is not inconsistent with the Commission's conclusion in Opinion No. 481-A.

31. Finally, EM/T argues that applying the new West Coast Naphtha and VGO values to retroactively value the West Coast Resid cut violates the filed rate doctrine. They contend that the West Coast Naphtha and VGO cut valuations used by the Quality Bank are filed rates because they are the only values for West Coast Naphtha and VGO that were just and reasonable prior to November 1, 2005—and hence, the only values that were lawful were those values prescribed by the Commission and incorporated in the TAPS Carriers' tariffs during that period.

32. Opinion No. 481-A recognized that this analysis was correct in valuing those costs as one of the parts of the TAPS stream under the distillation methodology. However, it held that the new valuation for those cuts in the retroactive Resid calculation required different treatment. EM/T argue that there is no basis for distinguishing between the West Coast Naphtha and VGO that are valued by the Quality Bank as parts of the TAPS stream, and the West Coast Naphtha and VGO coker components of the Resid cut. They state that "[b]oth [straight run and coker VGO and Naphtha valuations] are used by the Quality Bank for the sole purpose of determining the value of the Naphtha and VGO in the various TAPS

streams." Indeed, they claim that "they are precisely the same petroleum products with the same technical specifications and qualities."[29]

33. Moreover, they contend that even if there were some difference in the "purpose" for which the West Coast Naphtha and VGO valuations are used when valuing the Resid cut, the same tariff values for Naphtha and VGO must be used because the filed tariff rate is the only lawful rate "for all purposes." They cite *Maislin Industries, U.S., Inc. v. Primary Steel, Inc. (Maislin)*[30] where the Court stated "the legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, *for all purposes*, the legal rate, as between carrier and shipper"[31] (emphasis supplied).

34. *Maislin* is inapposite. That case involved the validity of a policy adopted by the Interstate Commerce Commission relating to the requirement under the Interstate Commerce Act (Act), 49 U.S.C. § 10101 *et seq* (1982 ed.) that motor common carriers must file their rates with the ICC, and both carriers and shippers must adhere to these rates. The ICC adopted a policy that relieved a shipper of the obligation of paying the filed rate when the shipper and carrier privately negotiated a lower rate. In *Maislin* the negotiated rate was never filed, and the carrier, in bankruptcy, later sought to receive the higher filed rate amount. The ICC upheld the shipper's defense finding that the carrier engaged in an unreasonable

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[29] EM/T rehearing request at 11-12.

[30] 497 U.S. 116 at 126 (1990)

[31] *Id.* at 12.

practice when it attempts to collect the filed rate after the parties have negotiated a lower rate.

35. The Court reversed stating:

> The Act, as it incorporates the filed rate doctrine, forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate. . . . By refusing to order collection of the filed rate solely because the parties had agreed to a lower rate, the ICC has permitted the very price discrimination that the Act by its terms seeks to prevent.[32]

Here there is no issue of a negotiated lower rate. Rather, the issue is whether for the limited purpose of calculating the value of Resid for the retroactive period, the newly determined just and reasonable value of the coker products can be used.

36. Moreover, we disagree with the contention that the West Coast coker Naphtha and coker VGO are the same as the Naphtha and VGO cuts. Coker VGO and coker Naphtha are manufactured from Resid when Resid is run through a coker. To arrive at the value, all of the costs of coking must be incurred for the coker products to exist. Moreover, as Petro Star notes in its Answer, "this fundamental fact means that Resid will be inaccurately valued if *West Coast* costs and *Gulf Coast* product prices are used to value West Coast Resid."[33]

37. Since it is the Resid valuation that is being determined in this proceeding, there is no reason why that value cannot include application of the new values of two coker components of the Resid on a

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[32] *Id.* at 130.

[33] Petro Star Answer at 9.

retroactive basis, even if those values will not be used retroactively for those cuts as parts of the TAPS stream under the distillation methodology. Accordingly, we affirm on rehearing that the new valuations for the West Coast Naphtha and VGO cuts are to be used in valuing Resid in the retroactive period from October 3, 2002.

III. *BP's Motion to Modify the Heavy Distillate Reference Price*

38. On May 17, 2006, BP filed a second renewed motion that the Commission order immediate use of new Heavy Distillate price adopted in Order No. 481, and order interim relief back to February 1, 2000, based on this price. Order No. 481 held that BP's original motion was moot because that order established the reference price for the Heavy Distillate cut, with retroactive refunds back to February 1, 2000. BP renewed its motion after Opinion No. 481 was issued, and Opinion No. 481-A similarly stated "This order moots BP's renewed motion," 114 FERC ¶ 61,323 at 62,200 n.10.

39. BP states in the instant renewed motion that because Order No. 481 provided that if rehearing requests were filed, compliance with the Commission's order would be deferred until thirty days after a final order, the subsequent filing of rehearing requests has delayed implementation of Order No. 481. As a result, the new Heavy Distillate reference price still is not in effect. BP asserts that large refunds are owed to TAPS Heavy Distillate shippers based on the new reference price, and the amount of the refunds continues to mount while the old reference price, which was adopted on an interim basis in February 2000, remains in effect. Accordingly, BP requests that the Commission immediately order the

new Heavy Distillate reference price into effect, and order interim refunds based on this new reference price for Heavy Distillate back to February 1, 2000.

40. We deny the motion. This order is the final order that triggers the compliance filing, and we direct the TAPS Carriers to make a compliance filing within thirty days of the order. We will not order interim refunds as to this one cut because refunds are due on other cuts as well. The TAPS' Quality Bank Administrator will be required to calculate the refunds due, or payments owed, for all shippers for all the Quality Bank cuts using the reference prices determined in this proceeding.

The Commission orders:

(A) The TAPS Carriers' request for clarification is granted as discussed in the body of this order.

(B) The requests for rehearing of EM/T and Conoco are denied.

(C) The TAPS Carriers are directed to make the required compliance filing within thirty days of this order.

By the Commission.
(SEAL)

Magalie R. Salas
Secretary

APPENDIX C

FEDERAL ENERGY REGULATORY COMMISSION
Commission Opinions, Orders and Notices

Docket No. OR89-2-018
Docket No. OR96-14-007
Docket No. OR98-24-003
Docket No. IS03-137-002
Docket No. IS03-141-002
Docket No. IS03-142-002
Docket No. IS03-143-002
Docket No. IS03-144-002

TRANS ALASKA PIPELINE SYSTEM
EXXON COMPANY, U.S.A.

v.

AMERADA HESS PIPELINE CORPORATION
TESORO ALASKA PETROLEUM COMPANY

v.

AMERADA HESS PIPELINE CORPORATION
BP PIPELINES (ALASKA), INC.
EXXONMOBIL PIPELINE COMPANY
PHILLIPS TRANSPORTATION ALASKA, INC.
UNOCAL PIPELINE COMPANY
WILLIAMS ALASKA PIPELINE COMPANY, L.L.C.

(Issued March 29, 2006)

OPINION NO. 481-A,
ORDER ON REHEARING

Before Commissioners: Joseph T. Kelliher, Chairman; Nora Mead Brownell, and Suedeen G. Kelly.

1. On October 20, 2005, the Commission issued Opinion No. 481,[1] an order on the exceptions to the Initial Decision (ID), issued by Administrative Law Judge Edward Silverstein (ALJ).[2] At issue in this proceeding is the method of making monetary adjustments among shippers of Alaska North Slope (ANS) oil on the Trans Alaska Pipeline System (TAPS). The adjustments, based upon the value of the "cuts" in the crude oil tendered, are made through a "Quality Bank," which either compensates or charges a shipper for the difference in quality between the crude oil tendered by that shipper and the crude oil received by that shipper. Shippers with lower quality oil pay into the Quality Bank, and shippers with higher quality oil receive payments from the Quality Bank.

2. The hearing resulted from remands of certain issues by the United States Court of Appeals for the District of Columbia Circuit in *Exxon Co. U.S.A. v. FERC*[3] and *Tesoro Alaska Petroleum Co. v. FERC*.[4] The Commission set the remand issues, as well as other issues, for hearing, by order issued November 7, 2001.[5] The ID required certain changes in calcu-

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[1] *Trans Alaska Pipeline System*, 113 FERC ¶ 61,062 (2005).

[2] *Trans Alaska Pipeline System*, 108 FERC ¶ 63,030 (2004).

[3] 182 F.3d 30 (D.C. Cir. 1999) (*Exxon*).

[4] 234 F.3d 1286 (D.C. Cir. 2000) (*Tesoro*).

[5] *Trans Alaska Pipeline System*, 97 FERC ¶ 61,150 (2001). The order provided for concurrent hearing with the Regulatory Commission of Alaska (RCA), which has jurisdiction over intrastate shipments on TAPS. On August 31, 2004, the RCA ALJ issued a decision adopting Judge Silverstein's ID, and on October 20, 2005, the RCA adopted Opinion No. 481 and applied its

lating the adjustments, with varying effective dates for these changes. Opinion No. 481 affirmed the ID, but required certain modifications in calculating the valuation of certain cuts, and, as required by recent Congressional action, limited any retroactive refunds resulting from the new valuations to February 1, 2000, rather than December 1, 1993, as the ID had directed. Requests for rehearing were filed by Flint Hills Resources Alaska LLC (Flint Hills), Petro Star, Inc., BP Exploration (Alaska), Inc. and BP American Production Company (BP), Williams Alaska Petroleum Inc. (Williams), and Union Oil Company of California and OXY USA, Inc. (Union Oil and OXY). The TAPS Carriers[6] filed for clarification or rehearing. This order grants rehearing in part, denies rehearing in part, and grants clarification as to certain issues.

Background

3. This order will only set forth the background necessary to understand the issues presented in the rehearing requests since the extensive background to this proceeding is described in great detail in the ID and in Opinion No. 481.

4. TAPS is a 48-inch diameter common carrier crude oil pipeline owned and operated by the TAPS Carriers, extending approximately 800 miles from

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findings to intrastate quality adjustments, RCA Order P-89-1 (104).

[6] At present, the TAPS Carriers consist of Amerada Hess Pipeline Corporation, BP Pipelines (Alaska), Inc., ExxonMobil Pipeline Company, ConocoPhillips Transportation Alaska (formerly Phillips Transportation Alaska, Inc.), Inc., Koch Alaska Pipeline Company, L.L.C. (formerly Williams Alaska Pipeline Company, L.L.C.) and Unocal Pipeline Company.

Alaska's North Slope to Valdez, Alaska, on Alaska's south central coast. The TAPS Carriers are affiliated with major oil companies that own producing interests in the North Slope, and as such these major oil producers are shippers on the system they control. However, there are other shippers on TAPS who are not affiliated with the owners of the system.

5. Oil produced on the North Slope originates from several fields, each of which contains crude oil of differing characteristics. The crude oil produced from these fields is transported to Pump Station No. 1, where all of the production streams are commingled. The resulting common stream is then transported to Valdez. Along the system there are refineries, where a portion of the crude is removed from the TAPS common stream, and the unused portion is reinjected into the TAPS common stream. As a result of this commingling, a shipper will not necessarily receive at Valdez the same quality of crude which it tendered for transportation.

6. In 1984, the Commission approved a Quality Bank using the gravity methodology[7] which put a higher value on crudes with a higher specific gravity.[8] In 1993, after producers constructed and put into operation a facility to process natural gas liquids (NGLs) found in ANS crude, the Commission held that a change in the methodology for valuing the crude oil was required because the presence of sub-

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[7] *Trans Alaska Pipeline System*, 29 FERC ¶ 61,123 (1984). The Quality Bank is administered by the Quality Bank Administrator (QBA). Administration costs are covered from the payments into the Quality Bank.

[8] The specific gravity of a substance is a comparison of its density to water.

stantial amounts of NGLs in the TAPS stream had skewed the relationship between the "gravity" of the stream and its value. To replace the gravity methodology, the Commission approved, as modified, a contested settlement that used a distillation method for valuing the streams, which would be applied prospectively.[9] Under this methodology the crude oil stream is separated into its component parts, or "cuts" of petroleum products, such as Propane and Naphtha, then market values are assigned to each cut, and each shipper's delivery is valued in accordance with the volume-weighted price of its component parts. Where no market price for a cut was available, the cut was valued using the price of a kindred product, subject to adjustment for the differences between that product and that cut.[10]

7. In *OXY U.S.A., Inc. v. FERC*, (*OXY*)[11] the Court affirmed the Commission's finding that a change in the methodology was required and that no refunds were due, but remanded the valuation of the Distillate and the Resid cuts. Following the Court's decision in *OXY*, Exxon Company, U.S.A. (Exxon) filed a complaint, in Docket No. OR96-14-000, challenging the distillation methodology. The Commission consolidated Exxon's complaint with the *OXY* remand

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[9] *Trans Alaska Pipeline System*, 65 FERC ¶ 61,277 (1993).

[10] The cuts under the distillation method are the following in the order in which they are distilled: Propane, Isobutane, Normal butane, Light Straight Run (natural gasoline, or light Naphtha), Naphtha (175œF - 350œF), Distillate (350œF - 650œF), Vacuum Gas Oil (VGO) (650œF - 1050œF), and Resid (over 1050œF). During the course of the proceedings there were slight changes in the temperature ranges of certain of the cuts.

[11] 64 F.3d 679 (D.C. Cir. 1995).

proceeding, and set the matters for hearing.[12] The Commission subsequently approved a contested settlement submitted by nine parties (the Nine Party Settlement) as a satisfactory resolution only of the valuation issues on remand of *OXY*.[13] The order held that the changes required by the Nine Party Settlement would take effect prospectively. The order did not resolve Exxon's complaint in Docket No. OR96-14-000, which remained before the ALJ.

8. In *Exxon*, the Court generally affirmed the 1997 Remand Order, but nonetheless held that the method of valuing the Resid cut did not bear a rational relationship to the actual value of Resid. The Court also found the decision to apply the settlement prospectively to be an abuse of discretion. The Court, therefore, vacated those portions of the order and remanded them to the Commission.

9. While the appeal in *Exxon* was pending, the hearing on Exxon's complaint in Docket No. OR96-14-000 proceeded before the ALJ, who then terminated the proceeding on the grounds that the arguments raised in the testimony were resolved in prior proceedings, and that there were no changed circumstances requiring a new Commission determination as to the reasonableness of the distillation methodology.[14] Further, the ALJ found that the arguments raised by Tesoro Alaska Petroleum Company (Tesoro), an intervener in the complaint proceeding, were moot as a result of the dismissal of the complaint, but that Tesoro could file its own complaint, which Tesoro did

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[12] *Trans Alaska Pipeline System*, 76 FERC ¶ 61,119 (1996).

[13] 81 FERC ¶ 61,319 (1997) (the 1997 Remand Order).

[14] *Exxon Co., U.S.A. v. Amerada Hess Pipeline Corp.*, 83 FERC ¶ 63,011 (1998).

in Docket No. OR98-24-000, challenging the valuation of the Naphtha and the VGO cuts.

10. On April 30, 1999, the Commission issued two orders. In one, the Commission affirmed the ALJ's dismissal of the Exxon complaint, and in the second, the Commission granted a motion to dismiss Tesoro's complaint.[15] Exxon and Tesoro appealed. In *Tesoro* the Court reversed the Commission, concluding that Exxon and Tesoro had presented sufficient evidence of changed circumstances as to the continued reasonableness of the distillation methodology and the valuation of the Naphtha and VGO cuts, and remanded those issues to the Commission for further proceedings.

11. The Commission's November 7, 2001 hearing order set these issues for hearing. The order also included the issue as to the valuation of the West Coast Heavy Distillate cut, as a result of the TAPS' QBA decision to use a new proxy for that cut. During the course of the hearing, the Commission set for hearing two changes in the Naphtha valuation that had subsequently been proposed by the TAPS' QBA, since the issues were related to the issues in the hearing.[16]

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[15] *Exxon Co., U.S.A. v. Amerada Hess Pipeline Corp.*, 87 FERC ¶ 61,133 (1999), and *Tesoro Alaska Petroleum Co. v. Amerada Hess Pipeline Corp.*, 87 FERC ¶ 61,132 (1999).

[16] *See Trans Alaska Pipeline System*, 102 FERC ¶ 61,345 (2003), and 104 FERC ¶ 61,201 (2003).

12. The ID decided six issues.[17] The Commission's order affirmed the ALJ's rulings on all the issues, but made certain modifications as to some of the issues. The requests for rehearing are directed at four of the issues, but not as to the other two, which were Issue No. 2, valuation of the West Coast Heavy Distillate cut,[18] and Issue No. 6, whether reparations were an issue in the proceeding.

13. However, before addressing the specific issues,[19] the Commission will address the TAPS Carriers' request for clarification as to the implementation date for the new methodology since it bears on the valuation of many of the cuts.

The TAPS Carriers' Request

14. The TAPS Carriers state that they have no financial interest in the TAPS Quality Bank and administer the Quality Bank in compliance with the

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[17] Prior to the hearing the parties entered into a stipulation, the October 3, 2002 Stipulation, which impacted a number of these issues. In addition to the six issues discussed, three other issues were to be determined at the hearing. However, the ID deferred ruling on these three issues. After issuance of the ID, the parties filed a motion to withdraw these issues. The ALJ granted the motion on June 16, 2005. *See* 111 FERC ¶ 63,068 (2005).

[18] Opinion No. 481 affirmed the ruling that the new Heavy Distillate cut valuation would be effective February 1, 2000, with retroactive refunds back to that date, and denied, as moot, BP's motion for an order directing interim refunds for the Heavy Distillate cut back to that date, 113 FERC ¶ 61,062 at P 249. On March 6, 2006, BP renewed that motion on the grounds that the pending rehearing stayed implementation of Opinion No. 481. This order moots BP's renewed motion.

[19] The issues will have the same number as in Opinion No. 481.

Commission's orders. As such, they state that they take no position on the justness and reasonableness of the various proposals made by the parties, or on the justness and reasonableness of Opinion No. 481. However, with respect to the administration aspect, they seek a modification of the implementation date for the revised methodology, and clarification concerning the valuation of West Coast Naphtha, and coker capital costs for the Resid valuation. The latter part of the request will be considered *infra* in the sections devoted to those cuts.

15. TAPS Carriers state that the Commission's order directs changes in some of the valuations which are to be effective prospectively from the date of the order, October 20, 2005.[20] They state that Quality Bank adjustments are calculated on a calendar month basis, and therefore they request November 1, 2005, as the implementation date for the revised methodology. They note that the values of the various components of the petroleum streams are based on monthly averages of prices, and the volumes of each petroleum stream shipped by each shipper are reported as totals for the month. Using November 1, 2005, as the effective date would result in including the full month of October in the calculation of the adjustment.

16. On the other hand, TAPS Carriers assert, if the October 20 date remains as the effective date, it would require calculating two separate adjustments for October for some of the cuts, one for the October 1 - October 19 period, and a second for the October 20 - October 31 period. This, they contend would create

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[20] TAPS Carriers cite to the change in the valuation of West Coast Naphtha and West Coast VGO.

three separate problems. First, data on the volumes of each stream shipped by each shipper do not exist except on a monthly basis. Second, the only assays of the streams are taken on a monthly composite basis. Third, the new formula-based values for West Coast Naphtha and Resid are to be calculated at the end of the month using monthly averages of other component values or prices so it would be difficult to make the calculation. Given these factors, the TAPS Carriers question how the QBA could calculate the values if implementation was not at the beginning of a month.

17. The TAPS Carriers cite to the QBA's testimony at the hearing, where he urged that implementation of any new valuation should be at the beginning of a month. The QBA testified as follows:

> Fourth, with respect to any component valuation revisions to be applied only prospectively, I recommend that such revisions be put into effect beginning on the first day of the first month after approval by both Commissions.[21]

No party objected to this recommendation.

18. Accordingly, the TAPS Carriers request a November 1, 2005, effective date. This, they assert "will greatly simplify implementation of the new methodology and avoid the need to address implementation issues that otherwise would have to be resolved."[22]

19. ExxonMobil and Tesoro (EM/T), ConocoPhillips Alaska, Inc. (CPAI), and the State of Alaska (Alaska), filed in support of the TAPS Carriers' request. Petro

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[21] TC-1 at 8 (Testimony of QBA James T. Mitchell).

[22] Request at 2.

Star and Flint Hills urge the Commission to reject the request.[23]

20. Petro Star argues that the effective date should not be changed because it will have negative financial consequences for refiners at both the Golden Valley Electric Association (GVEA) and Petro Star Valdez Refinery Connections. Petro Star states that an estimate of the impact on it from delaying implementation to November 1, 2005 is "approximately $500,000 in additional Quality Bank assessments."[24] Petro Star asserts that the three problems identified by the TAPS Carriers "are easily resolved."

21. In its request for rehearing, Flint Hills states that it was informed that the QBA might seek a November 1, 2005, effective date "based on alleged administrative convenience."[25] Flint Hills states there was no basis for such a request, and urges the Commission to reject it. Flint Hills' argument is similar to Petro Star's, namely that delay in the implementation would result in "hundreds of thousands of dollars in damage to Flint Hills."[26]

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[23] Flint Hills states that if the Commission changes the effective date, it should be changed to October 1, 2005, not November 1, 2005.

[24] Petro Star submitted an affidavit from an officer. The affiant states, after conceding that it "was not possible to precisely calculate the impact of delaying implementation," that he estimated the impact on Petro Star from delaying implementation from October 20 to November 1 "would be approximately $500,000." Bolz affidavit at 3.

[25] Rehearing request at 7.

[26] *Id.* at 8. To show the effect from the delay Flint Hills submitted an affidavit setting forth the current price differential between Gulf Coast and West Coast VGO, and Flint Hills' volumes for the relevant period.

22. The resolution offered by Petro Star to the concerns raised by the TAPS Carriers basically consists of pro-rating as to each of the problems. The Commission is not in a position to make a judgment whether the solution urged by Petro Star sufficiently addresses the problems posed by a mid-month effective date. Some parties are hurt and some parties are benefited from the new valuations. However, the QBA testified at the hearing that the effective date for any changes should be at the beginning of a month. No party objected to that testimony.

23. In this proceeding there are issues relating to the effective date that will have far more serious financial consequences on the parties than the financial consequences from the ten day period at issue here, such as the effective date for both the new West Coast Naphtha and West Coast VGO cut valuations, and whether there should be retroactive refunds for the new Resid cut valuation. These issues are addressed *infra*. Moreover, the October 20, 2005 date is unrelated to any relevant consideration, such as a tariff effective date, or an agreed-upon date by the parties, or a Congressionally-established refund date. It is merely the date the Commission issued Opinion No. 481. That date could have been November 1, 2005, or January 1, 2006, or any other date. Under these circumstances, we will grant the request, and make the effective date November 1, 2005.

ISSUE No. 1 - Valuation of the Resid Cut

I. *Resid Value Methodology*

A. *Opinion No. 481*

24. Resid is the portion of the petroleum stream remaining after distillation of all other cuts at lower boiling points. Under the Quality Bank, Resid is any

material that does not boil out until the temperature reaches or exceeds 1050œF. Before the hearing, the parties stipulated that Resid should be valued as a coker feedstock by valuing the coker products minus the cost of producing these products using the following formula: "Resid = Before-Cost Value of coker Products - (Coking Costs * Nelson Farrar Index)."[27] Further, the Coking Costs would be given a "single value," but the parties failed to agree on what that value should be. While not agreeing as to the "base year" the parties agreed that the Nelson Farrar Index to be used is a ratio of the Nelson Farrar Index (Operating Indexes Refinery) for the year in which the value is sought and the Nelson Farrar Index (Operating Indexes Refinery) for the base year.[28]

25. In Opinion No. 481, the Commission affirmed the ALJ's method for determining typical coking costs, which in turn, would be used to determine the value of Resid, subject to one modification.[29] First, the Commission agreed with the ALJ's determination of capital costs of a typical coker. The Commission agreed with the ALJ's finding that Mr. O'Brien (witness for Eight Parties) had omitted the costs of sev-

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[27] Joint Stipulation of the Parties, filed October 3, 2002, at 1 (Joint Stipulation).

[28] The Stipulation provided that the Before-Cost Value is to be calculated using a 3-step process: (1) the product (Fuel Gas, Propane, Isobutane, Normal Butane, LSR, Naphtha, Heavy Distillate, VGO, and coke) yields are to be determined through the use of the Process Industry Modeling System, Version 11.0 (PIMS); (2) values are to be determined for each; and (3), the product yields are to be multiplied by the product prices and the resulting values are added together.

[29] Opinion No. 481 found that a typical coker would only have bottom automatic deheading equipment, instead of both top and bottom deheading equipment.

eral items of equipment in his base cost curve approach that were included in Mr. Jenkins's (EM/T's witness) itemized approach for the direct costs, referred to as "Inside Battery Limits" (ISBL) costs,[30] of a typical coker's capital costs. In particular, the Commission agreed that a typical delayed coker, *i.e.*, a coker capable of processing 40,000 barrels per stream day of Resid,[31] would be expected to have: (1) four coke drums rather than the two assumed by Mr. O'Brien;[32] (2) automatic deheading equipment for safety and efficiency,[33] albeit bottom systems and not top systems; (3) adequate coke handling equipment, *i.e.*, "coke pit and crane, chutes and conveyor system, and covered storage," rather than the concrete "pad" and front end loader assumed by Mr. O'Brien;[34] and a coker gas plant.[35] The Commission agreed with the ALJ's determination to use Mr. O'Brien's cost curve approach with these additional costs.

26. Second, the Commission agreed with the ALJ's determination to include appropriate storage costs for storing the Resid as a coker feedstock and for the storage associated with downstream units in determining the indirect costs, or "Outside Battery Limits"

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[30] ISBL costs include the costs of the coker itself and related downstream refinery units.

[31] The parties adopted as the standard that the coker would have to be sized to be able to process 40,000 barrels per stream day of Resid with an 87 percent annual utilization rate. ID at P 957, 960.

[32] ID at P 1194.

[33] ID at P 1199.

[34] ID at P 1204.

[35] ID at P 1208.

(OSBL) costs,[36] of capital costs of a typical coker. The Commission affirmed the ALJ's use of Mr. O'Brien's approach using an average estimate for OSBL costs equal to 35 percent of the ISBL costs.

27. The Commission also agreed with the ALJ's use of a location factor of 1.27 to determine the cost of a typical West Coast coker because the construction costs, labor costs, and permitting costs are generally higher on the West Coast than on the Gulf Coast.[37]

28. Finally, the Commission agreed with the ALJ's finding that the Resid value that would result from using Mr. O'Brien's modified cost-curve approach would be just and reasonable. The Commission stated that the ALJ was not required to calculate the precise Resid value and that the TAPS Carriers must use O'Brien's cost curve approach along with O'Brien's cost figures unless the ALJ specifically referenced otherwise, *e.g.*, adopted Jenkins's estimate for a specific cost.

B. *Requests for Rehearing*

29. BP argues that the Commission erred by affirming the ID to the extent that the ID established cost deduction factors, *i.e.*, coker costs, that exceed those proposed by EM/T at the hearing and resulting Resid values on the Gulf Coast and West Coast that were less than the Resid values proposed in the hearing by EM/T. In this connection BP argues that the Commission erred by (1) adopting a cost deduction factor which is higher than EM/T's proposed cost de-

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[36] OSBL costs include costs for facilities necessary to support refinery processing units such as storage facilities, steam generation systems, etc., and finance costs.

[37] *See, e.g.*, EMT-116 at 7; EMT-169 at 6; EMT-146 at 13.

duction factor for the West Coast and the Gulf Coast; and (2) establishing a West Coast Resid value that is lower than the West Coast Resid value proposed by EMT.

30. BP argues that both the ALJ and the Commission failed to calculate the end result of the Resid value resulting from the findings in the ID, and to compare that result to the overall zone of reasonableness for the actual value of Resid which is established by the record in this case. It argues that the ALJ and the Commission did not attempt to analyze the overall justness and reasonableness of that value. Instead, BP argues, the ALJ and the Commission have engaged in a form of analysis that is comparable to focusing the calculation of the rate of return on equity in a rate case on the components of the calculation, and not assessing at the end of that process whether the overall return on equity falls within the zone of reasonableness supported by the record. BP states that such an approach is too narrow and that the Commission may only adopt a method of valuation "so long as the end result of the ratemaking process is reasonable."[38] BP argues that the resulting Resid deduction, *i.e.*, coker costs, is higher than any proposed by any party to the proceeding, thus lowering the value of Resid below that proposed by any party. BP concludes that if the end result of the methodology adopted by the ALJ and the Commission is not within the zone of reasonableness supported by the record, then the end result is not just and reasonable.

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[38] *Farmers Union Central Exchange v. FERC*, 734 F.2d 1486, 1527 (D.C. Cir. 1984).

31. Union Oil and OXY argue that the ALJ double counted the costs of the coker gas plant and the 4-drum coker. As to the gas plant, they argue that by enlarging O'Brien's ISBL costs, Opinion No. 481 had already increased the OSBL provision by an amount sufficient to cover the gas plant and all other OSBL items. Further, Union Oil and OXY argue that both Jenkins and O'Brien demonstrated that typical cokers use Resid tanks constructed for the base refinery, and that additional storage tanks would not be needed if one were to add a coker to an existing refinery. They request that the Commission either remove the gas plant costs from ISBL or reduce the OSBL multiplier from 35 percent to 25 percent.

32. With regard to the 4-drum coker, Union Oil and OXY argue that costs do not have to be added to O'Brien's cost estimate for a 2-drum coker, but that it is a matter of design, and that designing a coker with 4 drums rather than 2 need not involve higher costs. They state that O'Brien's cost curve shows one curve for a 2-drum coker, and another curve for a 4-drum coker, and that while the 4-drum curve extends higher, the two curves overlap, such that the peak of the 2-drum curve is at the same cost level as the bottom of the 4-drum curve. Union Oil and OXY conclude that where the curves overlap, either a 2-drum or 4-drum configuration can be built for the same cost.

C. *Commission Determination*

33. BP raises many of the same arguments regarding the justness and reasonableness of the methodology adopted by the ALJ to determine typical coker costs that the Commission addressed in Opinion No. 481. We are not persuaded to reverse our finding. Opinion No. 481 stated that the coker costs based on

the ALJ's rulings may be higher than Jenkins's estimate,[39] but that no party demonstrated that the ALJ's methodology for calculating coker costs, except as to the automatic deheading equipment, was incorrect. The ALJ added equipment to Mr. O'Brien's cost estimate where Mr. O'Brien admitted to not accounting for such equipment in his cost estimate.[40] As we stated in Opinion No. 481, "[f]or Eight Parties to argue that regardless of the fact that O'Brien admits that he did not include certain equipment, the ALJ's methodology should be result-oriented and, therefore, should be modified so that it does not result in costs that exceed Jenkins's estimate would be to ignore the evidence and testimony presented in the hearing."[41]

34. We reject BP's argument that the zone of reasonableness ceiling should be Jenkins's estimate on behalf of EM/T. Jenkins's and O'Brien's cost estimates were not the only estimates presented during the hearing.[42] In fact, O'Brien presented evidence which suggests that the coker cost estimate would be substantially higher than O'Brien's cost estimate as modified by the ALJ.[43] Therefore, Jenkins's coker cost estimate did not establish the "just and reasonable" ceiling so coker costs could exceed his estimate of those costs.

35. We also find no merit in BP's argument that the Commission and ALJ failed to calculate the

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[39] Eight Parties Appendix B to Brief on Exceptions.

[40] ID at P 1194 (2-drum coker instead of a 4-drum coker), P 1199 (automatic deheading equipment), P 1204 (coke handling equipment), and P 1208 (coker gas plant).

[41] Opinion No. 481 at P 47.

[42] *See* PAI-10.

[43] *Id.*

precise Resid value. Neither the ALJ nor the Commission was required to calculate the precise Resid value; much less that such an omission automatically results in an unjust and unreasonable decision. In this instance, the ALJ ruled on a methodology and the specific components thereto, and directed the TAPS Carriers to file revised tariff sheets in accordance with the rulings.[44] Because the ALJ ruled on all the issues that were disputed between the parties, there was no need to calculate the precise Resid value.

36. Union Oil and OXY's argument that the ALJ's methodology results in double counting of the coker gas plant costs, is contrary to the record evidence. As the evidence demonstrated, O'Brien only included in his cost estimate a "coke pad" and a "front end loader."[45] Jenkins, however, demonstrated that a typical coker, and particularly one on the West Coast, would include many more items such as coke handling equipment consisting of a coke pit and crane, appropriate chutes and conveyor system, and covered storage to move and store the coke at the refinery and meet environmental requirements.[46] In fact, O'Brien admitted that, though a coke pad and front-end loader might have been acceptable in 1996, he did not "think it would be today."[47] Furthermore, O'Brien specifically adjusted the coker cost estimates derived from treatises by removing such costs from those estimates in order to make those estimates

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[44] ID at P 3084.

[45] ID at P 1204 & n.454 (citing PAI-58 at 15).

[46] EMT-146 at 33-34; EMT-212 at 2-3.

[47] Transcript at 331-32.

comparable to his own coker cost estimate.[48] Consequently, adding these costs of these omitted items of coke handling equipment to O'Brien's coker cost estimate does not double count any costs.

37. The evidence also demonstrated that the costs of the coker gas plant should be included in ISBL and not in OSBL as Union Oil and OXY suggest. Both Jenkins and Gary, author of the Gary and Handwerk Treatise,[49] presented testimony that the coker gas plant should be included in ISBL.[50] In addition, the evidence demonstrated that gas plants are physically inside the battery limits as they are normally located as close as possible to the fractionator of the coker so that that the heat from the fractionator can be used in the plant.[51] Therefore, the coker gas plant should be included in ISBL.

38. We also reject the argument that the OSBL multiplier of 35 percent should be reduced to 25 percent. O'Brien testified that he used a higher 35 percent OSBL factor because, unlike Gary & Handwerk, which Union Oil and OXY consider to be the standard, he did not include separate cost estimates for the steam and cooling water facilities that would be required for the coker in his ISBL costs, but chose instead to include those costs in his 35 percent OSBL cost factor.[52] We recognize, as did the ALJ and Opinion No. 481, that increasing the ISBL causes a con-

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[48] PAI-10, Transcript at 408.

[49] James H. Gary & Glenn Handwerk, Petroleum Refining, Technology and Economics (4th ed. 2001).

[50] EMT-37 at 36; EMT-191 at 4.

[51] EMT-146 at 36-37; EMT-167 at 24-26; EMT-191 at 5-6; Transcript at 1327-28, 3493, 4084, 4093.

[52] PAI-1 at 24; Transcript at 445.

comitant increase to OSBL. However, this increase in OSBL accounts for appropriate storage costs for storing the Resid as a coker feedstock and for the storage associated with downstream units, which O'Brien did not account for in his OSBL estimate.

39. Union Oil and OXY contend that additional storage tanks would not be needed if a coker was added to an existing refinery. We disagree. The evidence demonstrated that the storage requirements of a refinery with a coker would be very different from the requirements of a refinery without a coker. A refinery without a coker would blend the Resid directly into fuel oil without any need for intermediate storage. On the other hand, a refinery with a coker would require intermediate storage for both the Resid and the coker output products to protect the coker from having to shut down due to a shutdown of any of the downstream processing units, and also to protect the downstream processing units by making product available in the event of a shutdown of the coker.[53] In addition, the storage tanks for Resid must be heated to around 500œF and insulated in order to keep the material in a liquid state, whereas tanks used for crude oil and other refinery products must be maintained at a temperature below 212œF.[54] Also, because the heating process for Resid storage tanks involves the use of open flames, for safety reasons, coker feedstock tanks are not normally located in the tank farm that is used for other refinery products, but are segregated in a separate area of the refinery.[55] Accordingly, we affirm our decision that the

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[53] ID at P 1039; Transcript at 625-26; EMT-37 at 48; Transcript at 3711-12.

[54] ID at P 1040; Transcript at 807-09; EMT-37 at 48.

[55] Transcript at 806-09; EMT-45.

increase in percentage of ISBL to estimate the OSBL costs, *i.e.*, 35 percent of ISBL instead of 20-25 percent of ISBL, coupled with the ALJ's decision to increase the ISBL costs, adequately provides for storage costs, as well as all other OSBL costs.

40. The record also contradicts Union Oil and OXY's argument that costs do not have to be added to O'Brien's cost estimate for a 2-drum coker in order to design a 4-drum coker. O'Brien himself testified at the hearing that if his coker cost estimate were based on a 4-drum coker rather than a 2-drum coker, his ISBL cost estimate would increase by $13.1 million. Moreover, the Eight Parties, of which Union Oil and OXY was a member, did not challenge the amount in their brief on exceptions.[56]

II. *Exhibit PAI-10*

41. Williams argues that the Commission should withdraw from the record Exhibit PAI-10, which is Mr. O'Brien's comparison of his cost estimate to similar coker cost estimates, because the ALJ erred by admitting it into evidence. Williams states that although the Eight Parties presented the exhibit for the record, they attempted to withdraw it at the end of O'Brien's testimony, but the ALJ nevertheless admitted it. Williams essentially argues that if an exhibit is withdrawn from or not included in the record the ALJ may not rely upon the exhibit.

42. We find Williams' arguments unpersuasive. PAI-10 was presented by Eight Parties as part of O'Brien's direct testimony during the hearing, and was subject to approximately eight days of cross-examination. Based on these circumstances, the ALJ

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[56] Eight Parties Brief on Exceptions at 39 & n.35.

decided to admit the exhibit into evidence on his own motion even though the Eight Parties did not move to have it admitted after the initial proffer.[57] The Eight Parties did not object to the Exhibit being in the record.[58]

43. Simply because the Eight Parties had the opportunity to choose whether to present a document to the ALJ does not give the Eight Parties the right to decide, once it has been presented, whether that particular document should be considered as evidence. Having chosen to submit the document at the hearing, how it will be treated is the role reserved for the ALJ.[59]

III. *Coke Handling Equipment*

A. *Request for Clarification and Responses*

43. TAPS Carriers request that the Commission specify the costs to be used for coke handling in the calculation of coker capital costs. In response to that request Williams argues that the Commission can only use the coke handling equipment cost that Jenkins calculated in Exhibit EMT-287 of $6.922 million for the Gulf Coast, and $8.8 million for the West Coast. Williams argues that Jenkins had the opportunity to include in his cost estimate whatever coke handling equipment he thought appropriate. Williams adds that the only other coke handling equipment costs are found in Exhibit PAI-10, which amount to $35.1 million. Williams argues, however, that that figure was not intended to be used in any of the cost figures that would determine the costs of a

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[57] Transcript at 1412-13.

[58] Transcript at 1412.

[59] 18 C.F.R § 385.504(b)(4) (2005).

coker in calculating the value of the Resid component of the TAPS Quality Bank.

44. In their response to the TAPS Carriers' request, EM/T argue that Opinion No. 481 requires the use of O'Brien's estimates of the coke handling equipment in Exhibit PAI-10. They contend that the ID did not adopt Jenkins's cost estimate, which did not include cost estimates for all three categories of equipment Jenkins had specified, *i.e.*, a coke pit and crane, appropriate chutes and conveyor system, and covered storage. EM/T argue that O'Brien did determine the costs of the three pieces of equipment,[60] and thus the estimate in Exhibit PAI-10 must be used.

B. *Commission Determination*

45. We agree with EM/T. Opinion No. 481 states that: "[A]s the ALJ found that O'Brien's cost curve should be used to value Resid, we clarify that the TAPS Carriers must use this approach *along with O'Brien's cost figures* unless the ALJ specifically referenced otherwise, *e.g.*, adopted Jenkins's estimate for a specific cost."[61] In Exhibit PAI-10, O'Brien specifically estimates the costs of each of the three coke handling equipment components. The ALJ did not adopt Jenkins's estimate for any of these costs. Therefore, consistent with our language in Opinion No. 481, O'Brien's cost figures in Exhibit PAI-10 must be used.

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[60] O'Brien's estimates included: (1) $11.5 million for coke crushing and screening; (2) $10.0 million for covered storage; and, (3) $13.6 million for coke pit and crane.

[61] Opinion No. 481 at P 50 (emphasis added).

IV. *West Coast Valuations for VGO and Naphtha in the Resid Valuation*

A. *Request For Rehearing*

46. Petro Star argues that the Commission erred by not requiring the new West Coast valuations for VGO and Naphtha to be used within the coker feedstock methodology for calculating retroactive values for West Coast Resid. It contends that under Opinion No. 481, Resid will be valued as a coker feedstock from February 1, 2000, onward, and that the processing costs for West Coast Resid will be determined based on the costs of operating a coker physically located on the West Coast (which would have higher capital costs than Gulf Coast refineries). However, Petro Star states that Opinion No. 481 leaves intact past Gulf Coast-based valuations for straight-run VGO and Naphtha, and fails to specify that when the coker feedstock methodology is implemented to value West Coast Resid retroactively, West Coast-based values must be used for coker VGO and coker Naphtha. It contends that in order for the valuation of West Coast Resid to meet the *OXY* standard, West Coast valuations for VGO and Naphtha must be used within the coker feedstock methodology retroactively so that Resid will not be undervalued relative to other cuts.

47. In addition, Petro Star argues that the West Coast-based valuations for coker VGO and Coker Naphtha can be used for retroactive valuation of West Coast Resid even if West Coast valuations are only applied prospectively to straight-run VGO and Naphtha. Petro Star argues that there will be no rationale for using Gulf Coast valuations for coker VGO and Naphtha to calculate retroactive values for Resid if the Commission adheres to its decision to

implement new valuations for straight-run West Coast VGO and Naphtha prospectively. Petro-star divides the valuations into "coker VGO and coker Naphtha," and "straight-run VGO and straight-run Naphtha." Petro Star reasons that when the "straight run" products are used in the distillation methodology, *OXY* requires them to be valued consistently with other cuts that are separated from the crude stream. Their values relative to other streams will determine whether their owners receive a windfall of profits or not. Distillates that are overvalued while other cuts are not will induce such a windfall. Petro Star asserts that the *OXY* consistency is a means to accomplish the end of accurate relative stream valuations. It continues that "coker" products do not factor into the calculation of relative stream values, but instead operate solely as tools used in calculating the value of Resid. Petro-Star concludes that if straight-run VGO and Naphtha valuations are incorrect, as it argues they are, the evidence shows they have been incorrect since at least October 3, 2002, and extending them to coker VGO and Naphtha compounds the error by making Resid valuations incorrect too.

48. Petro Star also states that West Coast valuations for coker VGO and coker Naphtha must still be used to calculate Resid values, and therefore should be used to determine retroactive values of West Coast Resid, at least as of the Parties October 3, 2002 Stipulation. Further, Petro Star argues that here, the Commission is prescribing rates that will alter the past status quo, and that therefore, nothing in the filed rate doctrine either requires or authorizes it to prescribe Gulf Coast-based valuations for the coker VGO and coker Naphtha components that the record evidence demonstrates are inaccurate and that would render the Resid valuation unjust and unreasonable.

B. *Commission Determination*

49. The Commission affirms the ruling that the new valuations for the West Coast Naphtha and VGO cuts will be applied on a prospective basis. However, we find merit in Petro Star's request that the new valuations for these cuts as coker products should be used when calculating the retroactive value for West Coast Resid from October 3, 2002, the date the parties stipulated the value of these cuts. There is no inconsistency in using the two different valuations for the West Coast Naphtha and VGO cut valuations because the valuations serve two different purposes, as Petro Star explains above, and using the new valuations more accurately reflect the value of Resid. Accordingly, we grant Petro Star's request for rehearing with respect to calculating the retroactive value for West Coast Resid from October 3, 2002.

Issue No. 3. - Naphtha

I. *Which Naphtha prices should be used for updating the Tallett regression analysis used for valuing West Coast Naphtha?*

A. *Opinion No. 481*

50. Opinion No. 481 affirmed the ALJ's ruling to use the Tallett Methodology to value West Coast Naphtha effective prospectively. Opinion No. 481 also affirmed the ALJ's rulings to use the Heavy Naphtha price to value Gulf Coast Naphtha effective March 1, 2003, and to use the arithmetic average of Heavy Naphtha Cargo and Heavy Naphtha Barge prices to value Gulf Coast Naphtha effective August 17, 2003.

B. *Request for Clarification*

51. TAPS Carriers request that the Commission clarify which Naphtha prices should be used for

updating the Tallett regression analysis to value West Coast Naphtha, because the issue has arisen as to how to recompute the constants in the regression equation in that methodology. TAPS Carriers submit that since Mr. Tallett originally computed the constants from a dual variable regression analysis using Gulf Coast prices for gasoline, jet fuel and Naphtha over a ten-year period from January 1992 through December 2001,[62] the QBA would update the regression analysis using Gulf Coast prices for the ten-year period 1995-2004. TAPS Carriers further submit that the constants obtained from that regression analysis would be used in the formula for the November and December 2005 Quality Bank calculations and then in January 2006, the QBA would again update the formula using data from the period 1996-2005.

52. TAPS Carriers submit that, prior to February 2003, Platts published a single Gulf Coast waterborne price for Naphtha, and then in February 2003, Platts began publishing a quotation for waterborne Heavy Naphtha and the Quality Bank began to use that quotation effective March 1, 2003. TAPS Carriers state that in May 2003, Platts began publishing four waterborne Gulf Coast Naphtha prices: (1) Naphtha, (2) Naphtha Barge, (3) Heavy Naphtha, and (4) Heavy Naphtha Barge, and effective August 17, 2003, the Quality Bank began using an arithmetic average of the Heavy Naphtha and Heavy Naphtha Barge prices, both of which changes the Commission upheld in Opinion No. 481.[63]

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[62] EMT-18.

[63] 113 FERC ¶ 61,062 at P 156, 164. The averaging issue is discussed *infra*, Part D.

53. TAPS Carriers assert that there is a question of which Gulf Coast Naphtha price should be used in the regression analysis for periods after March 1, 2003: the Heavy Naphtha price effective March 1, 2003, the arithmetic average effective August 17, 2003, or the full-range Naphtha since Tallett used it in his original analysis.

54. EM/T, CPAI, and Alaska filed in response answers to the TAPS Carriers' request. EM/T believes that the QBA should use the same Gulf Coast Naphtha prices that were used for Quality Bank valuation purposes. They state that prior to March 1, 2003, the Quality Bank would use the single Platts' "Naphtha" price which was then in effect; for periods after March 1, 2003, the Quality Bank would use the Platts prices that were approved for use by the Commission during those subsequent periods. CPAI agrees that the Heavy Naphtha prices should be used for those months in which published Heavy Naphtha prices are available. CPAI states that since the Commission ordered the use of the Heavy Naphtha price data to value Gulf Coast Naphtha because the Heavy Naphtha specifications most closely approximate ANS Naphtha, there is no justification for using a different published Gulf Coast price in the methodology. Alaska agrees with and supports EM/T and CPAI's positions.

C. *Commission Determination*

55. We find merit in the position set forth in the responses. Accordingly, the Commission clarifies that the QBA should use the following prices which were approved in Opinion No. 481 to update the regression analysis: (1) prior to February 2003, a single Gulf Coast waterborne price for Naphtha; (2) the Heavy Naphtha price effective March 1, 2003; and, (2) the

arithmetic average of the Heavy Naphtha Cargo and Heavy Naphtha Barge prices effective August 17, 2003.

II. *Is the Existing Method for Valuing West Coast Naphtha Still Just and Reasonable?*

A. *Opinion No. 481*

56. Opinion No. 481 affirmed the ALJ's finding that circumstances had changed materially since 1993 when the Commission determined that West Coast Naphtha should be valued on a Gulf Coast basis, and that "there is substantial evidence that continuing to base the value of West Coast Naphtha on the basis of Platts Gulf Coast Naphtha assessment no longer is just and reasonable."[64] Thus, continuing to value West Coast Naphtha on the basis of Gulf Coast prices would violate the D.C. Circuit's internal consistency requirement.[65] Accordingly, Opinion No. 481 affirmed the ALJ's finding that continued use of the Gulf Coast Naphtha price to value the West Coast Naphtha cut was no longer just and reasonable, and should be replaced with a viable, appropriate West Coast methodology.

B. *Rehearing Requests*

57. Union Oil and OXY present the same arguments that they urged in their Briefs on Exceptions to the ID concerning whether the existing method for valuing West Coast Naphtha is just and reasonable. Union Oil and OXY assert that the Commissions erred in concluding that continued use of the Gulf Coast Naphtha price to value West Coast Naphtha is no longer just and reasonable.

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[64] ID at P 2679; *see also* ID at P 2664

[65] *See OXY*, 64 F.3d at 693.

58. Union Oil and OXY maintain that even though circumstances have changed materially since 1993 when the use of Gulf Coast pricing was first approved, the Gulf Coast Naphtha price assessment remains the most reliable value for West Coast Naphtha. Union Oil and OXY further state that the reasons cited in Opinion No. 481 for abandoning the Gulf Coast price assessment to value West Coast Naphtha are not compelling. Union Oil and OXY claim that since the value of West Coast Naphtha is unknown it is necessary to draw conclusions about West Coast Naphtha based on refined products, and the witnesses' conclusions were split. Union Oil and OXY further argue that it is error for the Commissions to conclude that "there is no basis for a Gulf Coast Naphtha assessment that can be said to represent the value of West Coast Naphtha."[66] Union Oil and OXY argue that the ALJ and the Commission ignored a test of the reasonableness for continuing to use Gulf Coast prices as described in the affidavit of Mr. Sanderson, a witness for Williams. Union Oil and OXY also reject the conclusion that abandonment of Gulf Coast pricing is required by the Court of Appeals' internal consistency ruling because the replacement methodology the Commission approved is inconsistent with the way that any other cut is valued.

C. *Commission Determination*

59. In his analysis, the ALJ stated that "the Commission has changed its policy and no longer refuses to consider adjusted proxy prices for ANS cuts. Moreover, virtually no ANS is being shipped to the Gulf Coast any longer; in fact, on the whole, ANS pro-

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[66] Opinion No. 481 at P 94.

duction has greatly diminished since 1993."[67] Furthermore, West Coast Naphtha would be the only ANS cut still valued on a Gulf Coast basis, and would violate the *OXY* ruling.[68] Accordingly, we affirm Opinion No. 481's finding that circumstances had changed materially since 1993. Continuing to value West Coast Naphtha on the basis of Gulf Coast prices would violate the D.C. Circuit's internal consistency requirement. Thus, its continued use is no longer just and reasonable, and it must be replaced on a prospective basis with a viable West Coast methodology, such as the Tallett methodology, adopted by the ALJ.

III. *Tallett Methodology*

A. *Opinion No. 481*

60. Opinion No. 481 found that the Tallett methodology is objective because it determines the value of West Coast Naphtha based directly on published West Coast prices for regular unleaded gasoline and jet fuel.[69] Moreover, the standard statistical formula in the Tallett methodology is portable, can run on any computer, and no judgment is required to calculate the formula. Thus, anyone running the same analysis will come up with the same result.

61. Opinion No. 481 agreed with the ALJ that the evidence shows that higher West Coast gasoline prices lead directly to higher West Coast Naphtha values and that the value of Naphtha on the Gulf Coast more closely tracks the price of Gulf Coast gasoline than tracking Naphtha's value by the price

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[67] ID at P 2664.

[68] *See OXY*, 64 F.3d at 693.

[69] ID at P 2713.

of crude oil.[70] Opinion No. 481 further found that Tallett's regression formula properly reflects the major change in the West Coast market caused by the advent of California Air Resources Board (CARB) gasoline requirements and that the record evidence shows that CARB requirements make Naphtha more valuable. Opinion No. 481 stated that the additional costs that California refineries have to incur to produce CARB gasoline have resulted in significantly higher prices for CARB gasoline than for conventional gasoline.[71] Opinion No. 481 also stated that Tallett's regression formula compensates for any potential impact on Naphtha's West Coast value by the introduction of CARB gasoline by using both West Coast jet fuel prices, and West Coast prices for regular unleaded gasoline.

62. Opinion No. 481 affirmed the ALJ's finding that Tallett's regression analysis confirms that, as Naphtha's value as a gasoline and jet fuel feedstock is higher than its value as a petrochemical feedstock, the former use creates a ceiling on its use for the latter.[72] Opinion No. 481 also affirmed the ALJ's decision that the evidence shows that the Naphtha used on the Gulf Coast as a petrochemical feedstock is a different, lighter Naphtha than the heavier reformer-grade of Naphtha that is used on the West Coast.[73]

B. *Rehearing Requests*

63. Flint Hills asserts that, for the reasons previously stated in the prior briefings on this issue by a

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[70] ID at P 2710.

[71] 113 FERC ¶ 61,062 at P 125.

[72] ID at P 2715.

[73] *Id.*

number of parties, the Tallett formula does not generate a just and reasonable value for Naphtha on the West Coast. Flint Hills contends that the markets on the Gulf Coast and the West Coast are simply too different to allow the use of this type of regression formula, and it argues that this part of the Commission's decision, at paragraphs 122-128, should be reversed on rehearing.

64. Union Oil and OXY state that in affirming the ALJ's approval of the Tallett methodology as the replacement for valuing the West Coast Naphtha cut, the Commissions erred, and they argue that the Tallett methodology should be rejected and Gulf Coast pricing should be reinstituted as the proxy for valuing the West Coast Naphtha cut.

65. Union Oil and OXY state that the Commission did not understand that their argument is that the Tallett methodology uses Gulf Coast *price relationships*, not Gulf Coast prices, to value West Coast Naphtha.[74] Union Oil and OXY argue that the Commission's reasons for rejecting Williams's evidence on the margins between the price of crude oil and the value of Naphtha, on the ground that such evidence would "indicate nothing about the relative value of Naphtha," was erroneous.[75]

66. Next, Union Oil and OXY note that the Commission's holding that higher West Coast gasoline prices "led directly to higher West Coast Naphtha values," is a conclusion unsupported by factual evidence.[76] Union Oil and OXY also contend that the

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[74] 113 FERC ¶ 61,062 at P 122.

[75] *Id.* at P 123.

[76] *Id.* at P 124.

Commission erred in concluding that the Tallett methodology properly reflects changes caused by the advent of CARB gasoline, and that CARB requirements make Naphtha more valuable. Union Oil and OXY also argue that the Commission, in affirming the ALJ, erroneously concluded that "the value of Naphtha more closely tracks the price of Gulf Coast gasoline than the price of crude oil."[77] Finally, Union Oil and OXY claim that the Commission erred in rejecting the contention that petrochemical demand on the Gulf Coast undermines the Tallett method.

C. *Commission Determination*

67. All the arguments urged on rehearing are similar to the arguments raised by those parties in their Brief on Exceptions. Opinion No. 481 discussed each, and found no merit in them. The ID and Opinion No. 481 also addressed arguments that the Tallett methodology, using Gulf Coast price relationships, is erroneous. The ID and Opinion No. 481 found that the Tallett methodology, using the Gulf Coast price relationships between gasoline, jet fuel, and Naphtha to determine West Coast prices for Naphtha, was a just and reasonable method for determining West Coast Naphtha because the relationships were then applicable to objective West Coast prices.[78] We see no need to repeat that discussion since there is nothing new in the requests for rehearing. Accordingly, we deny rehearing and affirm that the Tallett methodology is an appropriate methodology to value West Coast Naphtha.

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[77] *Id.*

[78] ID at PP 2705-2708; 113 FERC ¶ 61,062 at PP 122-123.

IV. *Averaging Two Heavy Naphtha Published Prices.*

A. *Opinion No. 481*

68. In May 2003, Platts began publishing Heavy Naphtha price assessments in two categories, barge and ship cargo transactions. The QBA proposed to use the arithmetic average of the two Heavy Naphtha prices to value Gulf Coast Naphtha effective August 17, 2003. When certain parties protested, the Commission accepted the QBA's proposal, but set it for hearing as an issue in this proceeding.[79] The ALJ accepted the QBA's proposal, effective the date the Commission had accepted it.[80] Opinion No. 481 stated that the evidence in the record establishes that there are two reliable Platts price assessments for Heavy Naphtha, that both are supported by "numerous transactions," and that "[b]oth markets are therefore representative of the market for Heavy Naphtha on the Gulf Coast."[81]

B. *Rehearing Requests*

69. Williams states that Platts's addition of the new Gulf Coast Heavy Naphtha Barge price quote does not constitute a "radical alteration" of the pre-existing price quote used to value the Naphtha cut, and the prior valuation should not have been changed. Williams submits that the QBA's recommendation to average the prices, which the ALJ accepted, is inconsistent with the valuation of the other Quality Bank cuts. Williams contends that this approach intro-

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[79] 104 FERC ¶ 61,201 (2003).

[80] 113 FERC ¶ 61,062 at P 164.

[81] *Id.* at n.161.

duces a valuation that does not reflect Platts' assessment of the Gulf Coast Naphtha market.[82]

C. *Commission Determination*

70. We affirm Opinion No. 481's ruling accepting the ALJ's ruling. It is a matter of record that as of May 1, 2003, Platts began publishing two waterborne Heavy Naphtha prices. Since May 1, 2003, Platts' Heavy Naphtha price is an assessment of cargo transactions only, and it is not an overall assessment of the market as it was originally. Since both cargo and barge transactions are more representative of how the market actually flows, it is more appropriate to use the two assessments, namely Heavy Naphtha and Heavy Naphtha barge. (Exhibit TC-21) The QBA has the authority to make recommendations in situations where there are unanticipated implementation issues.

71. Williams presents the same arguments relating to this issue concerning the averaging of the two Heavy Naphtha prices that it presented in its Briefs and Reply Briefs on Exceptions of the Initial Decision, with the exception of a 12 page affidavit by Mr. Sanderson which it claims is new evidence. The Commission has already considered these arguments, and found no merit in them. As the hearing phase of this proceeding is concluded, we reject Williams's proffered affidavit as inadmissible at this stage of the proceeding.[83] Accordingly, we deny rehearing, and affirm the ALJ's ruling.

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[82] Williams submitted a 12 page affidavit of Mr. Sanderson to support its argument regarding the price averaging issue.

[83] *See, e.g., Trans Alaska Pipeline System*, 87 FERC ¶ 61,133 at 61,529 n. 73 (1999); *Ocean State Power II*, 69 FERC ¶ 61,146 at 61,548 (1994); *Philadelphia Electric Co.*, 58 FERC ¶ 61,060

Issue No. 4 - The Effective Date for the New Valuation of West Coast Vacuum Gas Oil Cut

I. *History of Opinion No. 481 Ruling*

72. In its May 1994 Order,[84] the Commission modified the reference price for valuing the VGO cut under the newly adopted distillation methodology. The Commission held that the Gulf Coast price for high sulfur VGO would be the reference price for both the Gulf Coast and the West Coast. The Commission rejected use of the West Coast price because of concern that the West Coast price was thinly traded, and was thus subject to manipulation. The reference price for VGO was not an issue in the *OXY* case. Thus, the Court's approval of the Commission's action in adopting the distillation methodology necessarily approved the Commission's action on the valuation of the VGO cut.

73. In August, 1998, Tesoro filed its complaint in Docket No. OR98-24-000 in which it objected to continued use of the existing VGO valuation and proposed that the West Coast VGO be valued using the West Coast VGO published price. The Commission dismissed the complaint finding that Tesoro's proposal had been previously considered and rejected by the Commission.[85]

74. In *Tesoro*, the Court held that the Commission should have addressed Tesoro's claim that the Commission's reason for not using the West Coast

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at 61,133 (1992). This practice has been upheld by the Courts, *Exxon Corp. v. FERC*, 114 F.3d 1252, 1260 (D.C. Cir. 1997).

[84] 67 FERC ¶ 61,175.

[85] 87 FERC ¶ 61,133 at 61,520.

VGO price in the May 1994 Order was no longer valid.

75. At the hearing in this proceeding, the parties, in an October 3, 2002 Stipulation,[86] stipulated that the West Coast VGO should be valued on the basis of the OPIS West Coast High Sulfur VGO weekly price, but disagreed as to the effective date. The Eight Parties argued that the new price should be put into effect on a prospective basis. EM/T argued that the effective date for the new price should be March 1, 2003.

76. The ALJ held that there was no evidence in the record which supports making the agreed-upon West Coast VGO price effective on a retroactive basis. Accordingly, he held that the West Coast VGO would be valued using the OPIS West Coast High Sulfur VGO weekly price on a prospective basis.[87] He added that since he had determined that the new valuation for the West Coast Naphtha cut value should also be made effective on a prospective basis, his ruling on the West Coast VGO valuation coincided with the parties' October 3, 2002, Stipulation. EM/T and Flint Hills filed exceptions to this ruling, asserting that the

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[86] The stipulation provided:

> Stipulation to Issue No. 4 - West Coast VGO Valuation
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> 1. West Coast VGO shall be valued based on the published OPIS West Coast High Sulfur VGO weekly price.
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> 2. The Parties disagree as to the effective date of the new West Coast VGO value. However, the Parties agree that if a different West Coast Naphtha valuation methodology is adopted in this proceeding, it and the new West Coast VGO value should have the same effective date.

[87] ID at P 2770.

effective date should be October 3, 2002, the date of the stipulation.

77. Opinion No. 481 found no merit in the exceptions. The Opinion stated that in *Tesoro* the Court made no finding as to the justness or reasonableness of the existing VGO valuation. Rather, the Court required the Commission to consider Tesoro's contention that the reason for not using the published West Coast VGO reference price was no longer valid. The issue of whether continued use of the Gulf Coast price was just and reasonable was not addressed at the hearing because the parties stipulated what that price should be. The Commission recognized, as had the ALJ, that nothing in the October 3, 2002 stipulation provided for any retroactive application of that price, or that it should apply from the date of the stipulation. However, the stipulation did provide that if a new West Coast Naphtha price was established, the effective date of both that price and the new West Coast VGO price should be the same. Since the ALJ's ruling on the Naphtha valuation, accepted by the Commission, was that it would be on a prospective basis, the prospective application of the new West Coast VGO price was consistent with the stipulation.

78. In addressing EM/T's exceptions, the Commission stated that the existing West Coast VGO reference price was approved by the Commission's May 1994 Order and was not an issue in *OXY*. Thus, it is the lawful rate until replaced by another rate. Even though the parties stipulated as to a new reference price, until the Commission issued an order adopting that price, the existing reference price continued as the lawful rate and could not be changed retroactively. Accordingly, the Commission

affirmed the ALJ's ruling that the new reference price for West Coast VGO would be applied on a prospective basis, with an October 20, 2005 effective date, the date the Commission's order issued.

A. *Requests for Rehearing as to the Effective Date*

79. Williams, Flint Hills, and Petro Star filed requests for rehearing as to the effective date for the new valuation. Williams asserts that in Opinion No. 481, the Commission approved averaging the two Gulf Coast Heavy Naphtha published price quotations, and used valuations during the period August 17, 2003 - October 20, 2003. Williams argues that the same August 17, 2003 date should be used for the effective date for the West Coast Naphtha under the second part of the October 3, 2002 Joint Stipulation.

80. Flint Hills asserts that the Commission's ruling that the new West Coast VGO value should be implemented on a prospective-only basis relying on the filed rate doctrine, "ignores the fundamental reality that all parties stipulated and agreed in October 2002 and that the OPIS West Coast High sulfur VGO weekly price was the just and reasonable value for VGO on the West Coast."[88]

81. Petro Star asserts that because the Commission determined to apply the new valuation of the Resid cut retroactively, the Commission erred in applying the new valuation for the West Coast VGO and Naphtha cuts prospectively. Petro Star contends that since the Quality Bank must use the valuations of all nine Quality Bank cuts to calculate the stream values used to determine the Quality Bank's actual monetary assessments, all nine of the Quality Bank

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[88] Rehearing request at 3.

cuts must be valued uniformly and consistently. Thus, it argues, it is error for the Commission to implement some of the new valuations prospectively, and other new valuations on a retroactive basis, which is the result here. Petro Star argues that all the relevant court decisions, *OXY*, *Tesoro*, and *Exxon*, support its position.

B. *Commission Ruling*

82. There is no merit to Williams' contention because the issue addressed here is the valuation of the West Coast VGO cut. The Naphtha valuation referred to in the stipulation also related to the "valuation of the West Coast Naphtha Cut." The ALJ ruled, and Opinion No. 481 affirmed, that the new valuation for the West Coast Naphtha cut would be implemented on a prospective basis. Thus, implementing the new valuation for the West Coast VGO cut prospectively is consistent with the October 3, 2002 stipulation. Implementation of the new valuation on a retroactive basis, as Williams argues for, would be contrary to the October 3, 2002 Joint Stipulation.

83. Flint Hills' argument ignores the fact that while the parties stipulated what the new valuation should be, there was no agreement when the new valuation would be implemented, one of the signatory parties to the stipulation arguing it should be on a prospective basis.

84. In Opinion No. 481, in discussing another party's exceptions to the ALJ's ruling on the effective date, the Commission stated that the existing valuation for the West Coast VGO cut was "the lawful just and reasonable rate until replaced by another rate." Thus, even if the parties stipulated what the new reference price should be for that cut "until the

Commission issues an order adopting that price, the existing reference price continues as the lawful rate."[89]

85. Flint Hills takes issue with this analysis in a number of ways, none of which has any merit. First, it asserts that because it is the shippers who are affected by the Quality Bank valuation the filed rate doctrine is inapplicable. It is not clear how the conclusion follows from that premise. Regardless, this proceeding is based upon the fact that the distillation methodology, and the amounts resulting from the valuations, are considered a rate. Accordingly, as the Court stated in *OXY*, 64 F.3d at 699, "the filed rate applies to changes in [the Quality Bank] methodology." Thus, until changed by a Commission order, an existing Quality Bank valuation applies unless there is a basis on which the Commission can order a retroactive implementation date. Opinion No. 481 explained that there is no basis for ordering a retroactive effective date as to the new valuation for the West Coast VGO cut. The order stated that there was no merit finding that the existing West Coast VGO valuation was no longer just and reasonable. The fact that the parties stipulated as to a new valuation is not a finding that the existing valuation was not just and reasonable.

86. Flint Hills argues that while it may be true that nothing in the stipulation provided for retroactive application, or that it should be the date of the stipulation "nothing in the stipulation precluded any party from making the argument that the agreed-upon VGO price should be made effective as of the date of the parties' agreement on that price. The

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[89] 113 FERC ¶ 61,062 at P 174.

stipulation simply left the parties free to make whatever arguments they wished on the effective date for the new price."[90]

87. However, contrary to Flint Hills' argument, there is something in the stipulation that does preclude the result Flint Hills seeks. The stipulation provides that if there are new valuations for the West Coast Naphtha cut, and for the West Coast VGO cut, the effective date for both should be the same. As stated above, the Commission has affirmed that the new valuation of the West Coast Naphtha cut will be implemented on a prospective basis, so under the stipulation any new West Coast VGO valuation should have the same prospective application.

88. Contrary to Petro Star's contention, there is a valid reason why there are different implementation dates for the new valuations adopted in Opinion No. 481. As the Commission explained in the order, since the valuation of the Resid cut under the Distillate methodology was challenged from the outset, and the Court upheld that challenge in *OXY*, there has not been a legal rate for the Resid cut until now. Thus, retroactive application of the new valuation for the Resid cut was not barred by the filed rate doctrine. This is not true for valuation of the West Coast VGO cut. The valuation of that cut was not challenged when the Commission adopted the Distillate methodology, which change the Court approved in *OXY* so the valuation of the West Coast VGO cut was the legal rate. Until the Commission adopted another valuation, that valuation continued. Thus, while the parties may have stipulated what would be an appropriate valuation for the West coast VGO cut,

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[90] Rehearing request at 6, n.9.

that did not become the legal rate until so ordered by the Commission.

89. Petro Star argues that continued use of the Gulf Coast VGO proxy for the West Coast VGO cut results in a lower valuation of the West Coast VGO and thus retroactive application is required.[91] The fact that the existing valuation resulted in some shippers being impacted negatively is not a basis for applying the new valuation on a retroactive basis. While the parties stipulated to a new valuation, that did not affect the existing rate on file. Moreover, the stipulation states that there was disagreement as to the effective date of the new West Coast VGO value, so the stipulation did not establish an effective date for the new valuation.

90. Accordingly, we deny rehearing, and confirm that the new valuation of the West Coast VGO cut will be implemented on a prospective basis.

Issue No. 5 - The Resid Cut Refund Period

A. *Opinion No. 481 Ruling*

91. The new valuations of the remanded cuts other than the Resid cut have been in effect since February 1, 1998, pursuant to the 1997 settlement between the parties. The ID concluded that the revised values of the remanded cuts should be made effective on a

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[91] Petro Star submitted an affidavit in support of its claim. The material set forth therein was available when Opinion No. 481 was issued. Thus, the affidavit does not satisfy the requirements of section 285.713(c)(3) of the Commission's Regulations which permits material to be submitted in a rehearing request if it is "based on matters not available for consideration by the Commission at the time of the final decision or final order." *See Southern Company Services*, Opinion No. 416-A, 82 FERC ¶ 61,168 at 61,612, n.14 (1998).

retroactive basis, and the retroactive period would start December 1993. Thus, the retroactive period for the Resid cut would have been the entire period from December 1993 to the present, and for the other new valuations, the refund period would have been between December 1993 and February 1998. However, on August 10, 2005, after issuance of the ID, and after the parties filed exceptions, Congress passed legislation limiting the period of any retroactive refunds in a pending TAPS proceeding to February 1, 2000.[92] As a result of this legislation, only the new valuation of the Resid cut could result in retroactive refunds, and only for the period after February 1, 2000. Thus, the issue presented to the Commission was whether it should affirm the ID's determination that the new values should be applied on a retroactive basis, with the retroactivity period limited, by the Act of Congress, to the period after February 1, 2000.

92. Before addressing the issue, the Commission stated that the arguments urging that the ALJ's ruling should not be accepted were addressed to the ID's conclusion that refunds were to be paid from December 1, 1993. Since that no longer is the period for the refunds, and those arguments must be considered in light of this change, those arguments no longer have the same validity that they might have had if the refund period started December 1, 1993. Moreover, another important factor to be considered

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[92] Section 4412 (b)(1) of the Motor Carrier Safety Reauthorization Act of 2005, Pub.L. No. PL 109-59, 119 Stat. 1144, provides that for TAPS proceedings commenced before the date of enactment of that act, the Commission "may not order retroactive changes in TAPS quality bank adjustments for any period before February 1, 2000."

was that as of the Congressionally mandated date of February 1, 2000, the Court had in 1999, in *Exxon*, again rejected the existing Resid cut valuation, and also had rejected the Commission's ruling that any new quality bank values would be applied prospectively. Thus, Opinion No. 481 stated that the vitality of the arguments against retroactive adjustments "has essentially been undermined by the Congressional action limiting the retroactive refund period to February 1, 2000."[93]

93. While the court in *Exxon* recognized that the Commission does have a measure of discretion whether there should be retroactive application of a rate ruling, nevertheless, in this case, the Commission was constrained by the Court's further statement in *Exxon* "that such discretion is not without its limits," and the Court's holding that the Commission had "abused that discretion" in applying the new valuation on a prospective basis.[94] The Court held that the equitable factors on which the Commission based its decision to apply the new valuations prospectively did not overcome the strong equitable presumption in favor of retroactivity which would make the parties whole.

94. The Court's concern was that the settling parties might have chosen prospective application of the settlement "to divvy up a windfall at the expense of the contesting parties."[95] The "windfall" referred to would be the inappropriate valuation of the Distillate and Resid cuts from 1993, the date the distillation method was adopted, until the implementation of

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[93] 113 FERC ¶ 61,062 at P 177.

[94] 192 F.3d at 50.

[95] *Id.*

revised valuation of these cuts. Given the strong presumption in favor of making injured parties whole, and the incentive that this creates for the parties to litigate regarding past errors and for the agency to correct those errors, the Court concluded that "on the record before us" the Commission "abused its discretion when it failed, without adequate explanation to make the revaluation and concomitant Quality Bank adjustments retroactive to 1993, when the distillation method was adopted."[96] The Court remanded the issue of the effective date of the new valuation method for action consistent with the Court's opinion.

95. The Commission's 2001 Hearing Order permitted the parties to introduce evidence why it would be inequitable to require retroactive application of the revised valuations for the Distillate and Resid cuts.

96. The ALJ concluded that "As there never has been a Resid proxy since the Commission implemented the distillation method on December 1, 1993, it follows that the value of the Resid proxy established by this order should be made effective on that date as well. However, the Eight Parties strenuously argue in support of a prospective only implementation."[97]

97. The ALJ reviewed the equitable grounds urged by Eight Parties but held that none sufficed to overcome his reasoning why retroactive application was required. Thus, Opinion No. 481 stated "Given the Court's ruling in *Exxon*, the question presented now is whether there is anything in the present record that was not present before that provides a

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[96] *Id.*

[97] ID at P 2941.

basis for not applying the new valuations on a retroactive basis, but limited to February 1, 2000."[98]

98. Opinion No. 481 found that the equitable arguments urged in the exceptions basically consisted of two grounds. The first was the inter-period one, that since the Commission did not require retroactive refunds when the Commission replaced the gravity methodology with the distillate methodology when the gravity methodology was found to be no longer just and reasonable, it would be inequitable to order retroactive application of the new valuation of the Resid cut, which would result in refunds which would benefit the very same parties who had benefited from the "no retroactive refunds" ruling as to the first period.

99. The second ground was that applying the new Resid valuation on a retroactive basis would not put the parties in the same position they would have been in had the Commission not made the legal error of adopting the wrong proxy for the remanded cuts. The argument contended that if the valuation of the remanded cuts had been different, the refiners would have operated their refineries differently to minimize their Quality Bank obligation. Accordingly, they argue it is inequitable to apply the new valuations retroactively.

100. Opinion No. 481 found no merit in these contentions. As to the inter-period inequity argument the order explained that there were legal differences between the two periods because the Distillate methodology was challenged from the outset of its adoption. This was not true for the gravity methodology, which was not immediately challenged after its adop-

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[98] 113 FERC ¶ 61,062 at P 217.

tion in 1984. Thus, until it was replaced by a new methodology, the rates under the gravity methodology were the rates on file, and the filed rate doctrine bars change to them on a retroactive basis.

101. As to the second ground, the Commission referred to the fact as of the February 1, 2000 date, the Court in 1999 in *Exxon* had rejected the existing Resid valuation, so refiners should have taken this into consideration in their operations after 1999. The Commission also explained that this case differed from those where the Commission did not require full retroactivity, such as *Panhandle*, where the Commission stated it did so because complete retroactivity "cannot restore the parties to the position they would have occupied in the absence of the Commission's error."[99]

B. *Requests for Rehearing*

102. Petro Star, and Union Oil and OXY seek rehearing of the Commission's ruling requiring refunds, with interest, from the congressionally-mandated date of February 1, 2000. Both assert that the Commission erred in rejecting the request that the Commission should have adopted the position it had taken in other cases when it did not require complete retroactivity. They both rely on the equitable argument that complete retroactivity will not be ordered when, as Union Oil and OXY argue, "it is impossible or difficult to return the parties to the position they would have been in absent agency error."[100] Petro Star, in a slightly different manner asserts that where the Commission cannot determine what the parties'

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[99] *Panhandle Eastern Pipe Line Co.*, 70 FERC ¶ 61,167 at 61,521 (1995).

[100] Rehearing request at 18.

position would have been absent the Commission's error, "the Commission has discretion to order refunds without interest if the equities so require."[101]

103. Union Oil and OXY assert that in Opinion No. 481 "the Commission recognized that refunds would *not* restore the parties to the position they would have been in but for the Commission's legal error,"[102] citing P 227. They continue that refunds were nevertheless ordered "to put salve on the wounds of those who were injured."[103] Union Oil argue that by so ruling, Opinion No. 481 conflicts with prior Court and Commission decisions.

104. Petro Star asserts that if the new Resid cut valuation "had been in place in 1993," refiners would have optimized their operations differently and paid lower Quality Bank assessments at that time. Moreover, implementing new Quality Bank charges retroactively now, would deprive refiners of the possibility of passing those charges through to the customers who bought fuel which led to the increased charges."[104]

105. Petro Star also contends that at a minimum, the Commission should have not required interest to be paid as it did in *Panhandle*. Petro Star asserts that the Commission's effort in Opinion No. 481 to distinguish the circumstances in the *Panhandle* case from the circumstances in this proceeding here is unconvincing.

106. Petro Star finally argues that "when the Commission determines that it cannot put the parties in

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[101] Rehearing request at 22.

[102] Rehearing request at 18.

[103] *Id.*

[104] Rehearing request at 23.

the positions they would have been in if there had been no Commission error, it can craft an equitable remedy or it can even deny retroactivity altogether," citing cases.[105] Accordingly, Petro Star requests the Commission to grant rehearing and "consider intermediate remedies, including withholding an award of interest."

107. Williams argues that it was error to extend the Resid valuation based on the cost of the delayed coker that was established in Opinion No. 481 back to February 1, 2000, because no refiner would have built a delayed coker costing that much before 2004 based on comparison of the resulting Resid coker feedstock value to the Resid fuel oil blend.

C. *Commission Ruling*

108. We find no merit in the requests. Clearly, under the *Exxon* ruling, complete retroactivity is required, absent compelling equitable grounds not to require it. In this case the reason why retroactivity is appropriate is clear. The new valuation of the Resid cut accurately reflects the value of the Resid cut, whereas the prior valuation overvalued the cut. To the extent certain parties benefited from the overvaluation of the Resid cut, other parties were harmed by the overvaluation because the Quality Bank is a zero sum arrangement. The retroactive refunds are necessary because prospective application of the new valuation "leave[s] the parties without remedy for the years of unlawful valuations and grant[s] the settling parties a windfall."[106]

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[105] Rehearing request at 22.

[106] *Exxon*, 192 F.3d at 47.

109. Both Union Oil and OXY's and Petro Star's argument is erroneously premised on the contention that the Commission conceded that the relief ordered would not put the parties back in the position they would have been in absent the Commission's legal error, which incorrectly valued the Resid cut. Both cite to P 227 in Opinion No. 481 where the Commission referred to "to the ALJ's 'supposed' recognition in n.880 that retroactive application of the new valuation would not put the parties back in the same position they would have been in had the new valuations been determined in 1993. . . ."[107]

110. First, the ALJ's statement referred to 1993, not to the period beginning February 1, 2000, that Opinion No. 481 ordered. Moreover, the ALJ made that statement in light of the fact that "Inasmuch as about 15 years of litigation has passed since this matter first was initiated, and that over that period, there have been multiple changes in the circumstances involving the ANS field, the participants, and local, national and worldwide economic conditions."[108]

111. However, as Opinion No. 481 responded, the parties citing the ALJ's statement ignored the conclusion that regardless of these factors, "refunds, if warranted, must be paid to those who paid too much into the Quality Bank and those who put in too little must be billed for their overpayment."[109] That remedy is what the Court in *Exxon* stressed was necessary to prevent a "windfall" to some parties who benefited from the wrong valuation.

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[107] 113 FERC ¶ 61,062 at P 227.

[108] 108 FERC ¶ 63,030 n.880.

[109] 113 FERC ¶ 61,062 at P 227.

112. The requesters' argument also ignores the fact that by limiting the refund period to after February 1, 2000, the validity of their equitable argument has been undermined. The Court in 1999, in *Exxon*, made it clear that the valuation of the Resid cut would have to be changed, and the new valuation would undoubtedly benefit those challenging the existing valuation. Those refiners who opposed the change were on notice that they should modify their operations to reflect the probably reduction in value of the Resid cut. Moreover, after 1999, refiners could have protected themselves contractually to provide for reimbursement from customers if the refiners' costs increased from a change in the valuation of the Resid cut.

113. Petro Star asserts that in Opinion No. 481 the Commission rejected the contention that no interest should be required, as the Commission had done in *Panhandle* because the Commission misapprehended the argument being advanced. In Opinion No. 481 the Commission stated:

> There are striking differences between the two situations. In *Panhandle*, the pipeline could have recovered the disputed amounts from customers legally, but in a different manner. Thus, in *Panhandle*, the Commission in denying the interest basically awarded half the full amount so there was an equal sharing of the relief. Here there is no way of knowing what the refiners' refund obligation would have been if they knew the Resid cut valuation from 1993 on. Thus, there is no basis for denying interest because to do so has

no relation to what is appropriate relief in this case."[110]

114. Petro Star contends that the argument was not that no refunds should be due. Rather it was "that if the new valuations had actually been in place in 1993, they could and would have optimized their operations differently and paid lower Quality Bank assessments at that time. Moreover, implementing new Quality Bank charges retroactively now would deprive them of the possibility of passing those changes through to the customers who bought the fuel which led to the increased charges."[111]

115. Petro Star's argument does not respond to the conclusion in Opinion No. 481 because Petro Star's premise is that refiners could have changed their operations with resulting lower Quality Bank assessment. Even if true, this does not mean that there would be no Quality Bank assessment owing by the refiners. However, even if this contention may have had some validity if refunds were ordered back to 1993, it has none as to the retroactive refunds that Opinion No. 481 requires refiners to pay, namely refunds back to 2000. As explained above, by the year 2000 refiners were on notice that they could not rely on the existing Resid cut valuation, and they should "optimize their operations" to reduce Quality Bank assessment from a lower-valued Resid cut. Moreover, they could have protected themselves contractually in all contracts entered into by them after the 1999 *Exxon* decision by providing that for the customer would be responsible for any additional costs imposed

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[110] 113 FERC ¶ 61,062 at P 233.

[111] Rehearing request at 3.

on the refiner from any new valuation of the Resid cut that was applied on a retroactive basis.

116. In Opinion No. 481, the Commission explained why the circumstances present in *Panhandle*, where no interest was required as part of the refund, were not present here. Petro Star asserts that here the Commission "refused to relieve the refiners from paying interest on refunds based on its view that, because the Commission cannot determine what positions the parties would have been in if the new Resid cut valuation had been in effect in 1993, there should be no attempt to balance the equities among the parties."[112]

117. Petro Star distorts the Commission's analysis in Opinion No. 481. In *Panhandle*, the pipeline was seeking to recover certain costs, and could have recovered them in the commodity sales rate to its customers. Instead, with Commission approval, it directly billed the customers for those amounts. However, the court held that direct billing of customers was illegal, and customers were entitled to refunds. In the remand order, the Commission held that since the pipeline could not now include the amount in the sales to customers that had already taken place, while it would require the pipeline to refund the directly-billed amount, it would not require the pipeline to also include interest on the refund because customers would have paid the refund amount to the pipeline but for the Commission's legal error. The Court approved the Commission's approach, since interest on refunds is to compensate a party for the time value of the illegally collected amount. In *Panhandle*, the customer would have had to pay the

[112] Rehearing request at 25.

amount under the alternative method so there was no deprivation of the use of any money by the customer. In the present case, there was nothing to establish what different amount the refiners would have paid into the Quality Bank if the new Resid cut valuation was in effect starting in 2000.

118. Petro Star and Union Oil and OXY cite to other cases where because the parties would not be put back in the same position by retroactive application of the remedy, the Commission did not order complete retroactivity. None are similar to the instant case, and none support their contention, especially since here the Court of Appeals has indicated that absent compelling reasons the remedy should "make whole parties who are clearly injured by undervaluation."[113] While in those cases, the Commission stated that it was taking its action because it was not possible to restore the *status quo ante*, the circumstances there differ completely from the present case.

119. In *Southern Natural Gas Co. (Southern)*,[114] cited by both, the Commission first held a zone delivery rate design unjust and unreasonable and accepted an interim rate design, a zone matrix design. Then, on March 16, 1994, the Commission reversed its acceptance of the interim rate design, and required the pipeline to reinstate the zone of delivery rate design retroactive to November 1, 1993, the date the interim zone matrix rate design had become effective. In its compliance filing the pipeline proposed to reinstate the zone of delivery rate design and make those rates effective April 1, 1994, and proposed to defer collecting higher FT commodity and IT rates

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[113] *Exxon*, 192 F.3d at 49.

[114] 67 FERC ¶ 61,262 (1994).

that it would be entitled to collect from November 1, 1993 through March 31, 1994, under the zone of delivery rate design pursuant to the March 16 Order.

120. After noting that shippers have already made their decisions to purchase transportation service in reliance on the rates in effect from November 1, 1993, through March 31, 1994, so it was not possible to restore the full *status quo ante*, the Commission concluded:

> In this case, the Commission will exercise the discretion described in these court cases to accept part of Southern's compliance filing proposal. The Commission views Southern's proposal to make the zone of delivery rate design effective on April 1, 1994, which no customer protests, as a practical and equitable compromise between the Commission's retroactive reinstatement of rates based on a zone of delivery rate design and Southern's (and the Commission's) desire to avoid, if possible, retroactive billings. No party has proposed a better alternative.[115]

121. In *Southern*, the pipeline, by asking for the April 1, 1994 effective date, chose not to recover the higher rate on a retroactive basis, and the Commission accepted its proposal. There was no issue as to interest on refunds, because no refunds were ordered.

122. In *New York ISO*,[116] the New York ISO, in a March 27, 2000 filing claimed that starting January 29, 2000, there were indications of the exercise of market power in the reserve markets in its control area. It proposed to suspend market-based bids, es-

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[115] 67 FERC ¶ 61,262 at 61,905.

[116] 91 FERC ¶ 61,218 (2000).

tablished bid caps, and it also sought to initiate an ADR settlement prior to determine the correct charges for the past period until the proposed bid caps became effective. The Commission denied the request. The Commission noted that the ADR procedures are voluntary and a number of parties indicated the ADR could not resolve the issue, particularly since "it would be very difficult . . . to simply recalculate the correct market-based rates."[117] Moreover, the Commission stated "such changes should be prospective. Customers cannot effectively revisit their economic decisions in these circumstances—there is no way for buyers and sellers to retroactively alter their conduct."[118] Given all these factors, there was no basis for retroactive billing. In this case, there are no such impediments. The remedy will require those who benefited from the overvaluation to disgorge that amount, an amount readily calculable.

123. In another lengthy Commission proceeding where the Commission first approved, and subsequently, after a court remand, denied natural gas producers the right to collect from customers certain charges, the Commission required refunds, with interest on the illegally collected amount. Producers sought to be relieved of the interest obligation, since the interest on the overcharge amounted to 160 percent of the principal. The Commission denied the request, and the Court of Appeals affirmed.[119]

124. The Court stated that "the Commission's general policy, in effect for many years, requires interest

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[117] *Id.* at 61,804-05.

[118] *Id.* at 61,804.

[119] *Anadarko Petroleum v. FERC*, 196 F.3d 1264 (D.C. Cir. 1999).

to be paid on various kinds of overcharges."[120] The fact that there was a long delay, the Court stated, was not a ground for altering the producers' interest obligation since "interest is simply a way of ensuring full compensation."[121]

125. In response to the argument that producers were being penalized for their reliance on the Commission's erroneous prior ruling, similar to that one made here that refiners relied on the prior Resid cut valuation, the Court stated producers "misapprehend[s] the purpose of awarding interest. Interest is not awarded against someone for conducting litigation in bad faith; it is, as the Commission knew, awarded to make the prevailing party whole."[122]

126. In short, the instant case involves two groups, one includes those who benefited from the prior illegal rate, and a second, consisting of those who were injured by the erroneous rate. The retroactive remedy, with interest, corrects the legal error from February 1, 2000 by awarding the injured party the funds they would have had absent the Commission's legal error. Accordingly, we deny rehearing on this issue.

127. We also disagree with Williams's argument that it was error to extend the Resid valuation based on the cost of the delayed coker that was established in Opinion No. 481 back to February 1, 2000, because no refiner would have built such a delayed coker before 2004. The evidence demonstrates that the coke handling equipment, which we addressed above, in-

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[120] *Id.* at 1267.

[121] *Id.* at 1268.

[122] *Id.*

corporated in the cost of the delayed coker, should be applied back to February 1, 2000. All of the 4-drum cokers located on the West Coast, for instance, were constructed prior to 1995.[123] In addition, it was demonstrated that all cokers built in the last ten years have been built with automatic deheading equipment.[124] Therefore, the equipment included in the cost of the delayed coker is representative of equip-ment installed in modern cokers during the period of retroactivity.

The Commission orders:

(A) The requests for rehearing are granted in part, and denied in part, and clarification is granted, as discussed in the body of this order.

(B) The new valuations applied on a prospective basis are effective November 1, 2005.

By the Commission.
(SEAL)

Magalie R. Salas
Secretary

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[123] *See* EMT-188; Transcript at 270-01.

[124] Transcript 3894, 4110; EMT-211 at 10-11.

APPENDIX D

FEDERAL ENERGY REGULATORY COMMISSION
Commission Opinions, Orders and Notices

Docket Nos. OR89-2-016, OR89-2-017
Docket Nos. OR96-14-005, OR96-14-006
Docket Nos. OR98-24-000, OR98-24-002
Docket Nos. IS03-137-000, IS03-137-001
Docket Nos. IS03-141-000, IS03-141-001
Docket Nos. IS03-142-000, IS03-142-001
Docket Nos. IS03-143-000, IS03-143-001
Docket Nos. IS03-144-000, IS03-144-001

TRANS ALASKA PIPELINE SYSTEM
EXXON COMPANY, U.S.A.

v.

AMERADA HESS PIPELINE CORPORATION
TESORO ALASKA PETROLEUM COMPANY

v.

AMERADA HESS PIPELINE CORPORATION
BP PIPELINES (Alaska), INC.
EXXONMOBIL PIPELINE COMPANY
PHILLIPS TRANSPORTATION ALASKA, INC.
UNOCAL PIPELINE COMPANY
WILLIAMS ALASKA PIPELINE COMPANY, L.L.C.

(Issued October 20, 2005)

OPINION NO. 481

Before Commissioners: Joseph T. Kelliher, Chairman; Nora Mead Brownell, and Suedeen G. Kelly.

APPEARANCES

John E. Kennedy, Louis R. Veerman, Heather H. Grahame, John B. Rudolph, Sara C. Weinberg and *Andrea M. Halverson* on behalf of the TAPS Carriers

John W. Griggs and *Debra B. Adler* on behalf of Union Oil Company Of California and OXY USA, Inc.

Patricia Godley and Richard A. Curtin on behalf of Petro Star, Inc.

Jeffrey G. DiSciullo and Robert H. Benna on behalf of Tesoro Alaska Petroleum Company

Randolph L. Jones, Jr., Melinda L. Kirk and Alex Goldberg on behalf of Williams Alaska Petroleum, Inc.

Eugene R. Elrod, James F. Bendernagel, Jr., Ronald S. Flagg, Kurt H. Jacobs, C. John Buresh, Robert W. Johnson, and *R. Bryant Siddoway* on behalf of Exxon Mobil Corporation

John A. Donovan, Matthew W.S. Estes, Graham Vanhegan and Barbara Fullmer on behalf of ConocoPhillips Alaska, Inc.

Bradford Keithley, Jason F. Leif, Jones Day and Bradley S. McKim on behalf of BP Exploration (Alaska), Inc. and BP America Production Company

James M. Armstrong and Travis A. Pearson on behalf of Flint Hills Resource Alaska, LLC

Gregg D. Renkes, Robert E. Mintz, W. Stephen Smith and *Edward Twomey* on behalf of the State of Alaska

Marc Gary Denkinger and *Arnold H. Meltz* on behalf of the Federal Energy Regulatory Commission

OPINION AND ORDER ON INITIAL DECISION

1. This case is before the Commission on the exceptions to the Initial Decision (I.D.), issued August 31, 2004, by Administrative Law Judge Edward Silverstein (ALJ).[1] At issue is the method of making monetary adjustments among shippers of Alaska North Slope (ANS) oil on the Trans Alaska Pipeline System (TAPS). The adjustments are made through a "Quality Bank" which either compensates or charges a shipper for the difference in quality between the crude oil tendered by that shipper and the crude oil received by that shipper. The hearing resulted from remands of certain issues by the United States Court of Appeals for the District of Columbia Circuit in *Exxon Co. U.S.A. v. FERC*[2] and *Tesoro Alaska Petroleum Co. v. FERC*.[3] The Commission set the remand issues, as well as other issues, for hearing, by order issued November 7, 2001.[4] The order provided for concurrent hearing with the Regulatory Commission of Alaska (RCA), which has jurisdiction over intrastate shipments on TAPS.[5] The I.D. required certain changes in calculating the adjustments, with varying effective dates for these changes. The Commission largely affirms the I.D., but as required by recent Congressional action, limits any retroactive refunds resulting from the new valuations, to February 1, 2000, rather than back to December 1, 1993, as the I.D. had directed.

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[1] *Trans Alaska Pipeline System*, 108 FERC ¶ 63,030 (2004).

[2] 182 F.3d 30 (D.C. Cir. 1999) (*Exxon*).

[3] 234 F.3d 1286 (D.C. Cir. 2000) (*Tesoro*).

[4] *Trans Alaska Pipeline System*, 97 FERC ¶ 61,150 (2001).

[5] On August 31, 2004, the RCA ALJ issued a decision adopting Judge Silverstein's *I.D.*

Background

2. TAPS is a 48-inch diameter common carrier crude oil pipeline owned and operated by the TAPS Carriers,[6] extending approximately 800 miles from Alaska's North Slope to Valdez, Alaska, on Alaska's south central coast. The TAPS Carriers are affiliated with major oil companies that own producing interests in the North Slope, and as such these major oil producers are shippers on the system they control. However, there are other shippers on TAPS who are not affiliated with the owners of the system.

3. Oil produced on the North Slope originates from several fields, each of which contains crude oil of differing characteristics. The crude oil produced from these fields is transported to Pump Station No. 1, where all of the production streams are commingled. The resulting common stream is then transported to Valdez. Along the system there are refineries, where a portion of the crude is removed from the TAPS common stream, refined primarily for generation purposes, and the unused portion is injected into the TAPS common stream. As a result of this commingling, a shipper will not necessarily receive at Valdez the same quality of crude which it tendered for transportation. In 1984, the Commission approved a Quality Bank using the American Petroleum Institute (API) gravity methodology, whereby shippers of crude with a higher quality than the common stream would

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[6] In the instant proceeding the TAPS Carriers consist of Amerada Hess Pipeline Corporation, BP Pipelines (Alaska), Inc., ExxonMobil Pipeline Company, ConocoPhillips Transportation Alaska (formerly Phillips Transportation Alaska, Inc.), Inc., Koch Alaska Pipeline Company, L.L.C. (formerly Williams Alaska Pipeline Company, L.L.C.) and Unocal Pipeline Company.

be compensated, and shippers of lower quality crude would be charged.[7] This methodology puts a higher value on crudes with a higher specific gravity.[8]

4. In 1993, after producers constructed and put into operation a facility to process natural gas liquids (NGLs) found in ANS crude, the Commission held that a change in the existing gravity-based Quality Bank was required because the presence of substantial amounts of NGLs in the TAPS stream had skewed the relationship between the "gravity" of the stream and its value since NGLs with their low specific gravity do not have as high a value as crude with a similarly low specific gravity. The gravity method however, attributed the same value to them. To replace the gravity methodology, the Commission approved, as modified, a contested settlement that used a distillation method for valuing the streams.[9] Under that methodology the crude stream is separated into its component parts, or "cuts," market values are assigned to each cut, and the value of a crude stream is determined by the relative weighting of the cuts. The cuts under the distillation method are the following in the order in which they are distilled: Propane, Isobutane, Normal butane, Light Straight Run (natural gasoline, or light Naphtha), Naphtha (175œF - 350œF),

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[7] *Trans Alaska Pipeline System*, 29 FERC ¶ 61,123 (1984). The Quality Bank is administered by the Quality Bank Administrator (QBA). Administration costs are covered from the payments into the Quality Bank.

[8] The specific gravity of a substance is a comparison of its density to that of water.

[9] *Trans Alaska Pipeline System*, 65 FERC ¶ 61,277 (1993).

Distillate (350œF - 650œF), Vacuum Gas Oil (VGO) (650œF - 1050œF), and Resid (over 1050œF).[10]

5. In *OXY U.S.A., Inc. v. FERC*,[11] the Court affirmed the finding that a change in the methodology was required, and that no refunds were due, but remanded the valuation of the distillate and Resid cuts. Following the Court's decision in *OXY*, Exxon Company, U.S.A. (Exxon) filed a complaint, in Docket No. OR 96-14-000, challenging the distillation methodology. The Commission consolidated Exxon's complaint with the *OXY* remand proceeding, and set the matters for hearing.[12] During the course of the consolidated proceedings, parties filed three different settlement proposals on the remanded issues, one by nine parties (Nine Party Settlement), and separate, unilaterally-proposed settlements by Exxon and Tesoro Alaska Petroleum Company (Tesoro). The Nine-Party Settlement was certified as a contested settlement, and the Commission approved it as a satisfactory resolution only of the valuation issues on remand of *OXY* (the 1997 Remand Order).[13] The order held that the changes required by the settlement would take effect prospectively. The order did not resolve Exxon's complaint in Docket No. OR96-14-000, which remained before the ALJ.

6. In *Exxon*, the Court generally affirmed the 1997 Remand Order, but nonetheless held that the method of valuing Resid did not bear a rational relationship to the actual value of Resid. The Court also

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[10] During the course of the TAPS proceedings there were slight changes in the temperature ranges of certain of the cuts.

[11] 64 F.3d 679 (D.C. Cir. 1995) (*OXY*).

[12] *Trans Alaska Pipeline System*, 76 FERC ¶ 61,119 (1996).

[13] 81 FERC ¶ 61,319 (1997) (the 1997 Remand Order).

found the decision to apply the settlement prospectively to be an abuse of discretion finding that the equitable factors on which the Commission based its decision to order only prospective changes did not overcome the strong equitable presumption in favor of retroactivity that would make the parties whole. The Court therefore vacated those portions of the order and remanded them to the Commission.

7. While the appeal in *Exxon* was pending, the hearing on Exxon's complaint in Docket No. OR96-14-000 proceeded before the ALJ. After argument and briefing on the issues, the ALJ issued an initial decision terminating the proceeding on the grounds that the arguments raised in the testimony were resolved in prior proceedings, and that there were no changed circumstances requiring a new Commission determination as to the reasonableness of the distillation methodology.[14] Further, the ALJ found that the arguments raised by Tesoro, an intervener in the complaint proceeding, were moot as a result of the dismissal of the complaint, but that Tesoro could file its own complaint challenging the lawfulness of the Quality Bank distillation methodology. Subsequently, Tesoro filed its own complaint, in Docket No. OR98-24-000, alleging that the valuation of the Naphtha and VGO cuts under the distillation methodology resulted in inaccurate relative values in violation of the law.

8. On April 30, 1999, the Commission issued two orders. In one it affirmed the ALJ's dismissal of the Exxon complaint, and in the second it granted a mo-

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[14] *Exxon Co., U.S.A. v. Amerada Hess Pipeline Corp.*, 83 FERC ¶ 63,011 (1998).

tion to dismiss the Tesoro complaint.[15] Exxon and Tesoro appealed. In *Tesoro* the Court reversed the Commission. The court concluded that Exxon and Tesoro had presented sufficient evidence of changed circumstances as to the continued reasonableness of the distillation methodology and the valuation of the Naphtha and VGO cuts, and remanded those issues to the Commission for further proceedings.

9. On November 24, 1999, the TAPS' Quality Bank Administrator (QBA) notified the Commission of a change in one of the published prices used to determine the value of the Heavy Distillate component (450œF-650œF). Pursuant to the Quality Bank methodology, the price for Heavy Distillate on the West Coast is set at Platt's Oilgram Price Report (Platt's) reported figure for West Coast High Sulfur (0.5 percent) Waterborne Gasoil. Platt's announced that effective November 1, 1999, it would no longer assess US West Coast Waterborne Gasoil reflecting a sulfur content of 0.5 percent sulfur.

10. On February 9, 2000, the Commission issued an order which accepted Platt's West Coast LA Pipeline LS No. 2 (0.05 percent) as the appropriate proxy for the West Coast Heavy Distillate cut, and referred the issue of the correct level of adjustment to a settlement judge.[16] When no settlement could be achieved, the matter was included in the Commission's November 7, 2001 Hearing Order.

11. During the course of the hearing, the Commission set for hearing two changes in the Naphtha valua-

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[15] *Exxon Co., U.S.A. v. Amerada Hess Pipeline Corp.*, 87 FERC 61,133 (1999), and *Tesoro Alaska Petroleum Co. v. Amerada Hess Pipeline Corp.*, 87 FERC ¶ 61,132 (1999).

[16] *Trans Alaska Pipeline System*, 90 FERC ¶ 61,123 (2000).

tion that had subsequently been proposed by the TAPS' QBA, since the issues were related to the issues in the hearing.[17] The hearing took 108 days, with 19 witnesses, and 1474 exhibits introduced into evidence, and resulted in the subject I.D.

12. The I.D. decides the six issues set forth below, and there is a brief statement of the rulings made on each issue. Prior to the hearing the parties entered into a stipulation[18] relating to some of the issues, which will be considered when the issues are discussed.[19]

> 1. What is the appropriate method for valuing the Resid cut?
>
> The I.D. describes the various steps in valuing the Resid, to be effective December 1, 1993. This will require the QBA to recalculate the Quality Bank adjustments from that time, and payments will go to and from shippers. However, in the event that the TAPS Carriers do not recover all the amounts due from shippers who will owe these additional amounts under the new reference price, the TAPS Carriers will not be responsible for the difference, and the shippers entitled to the additional amounts will be paid on a pro-rata basis.

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[17] *See Trans Alaska Pipeline System*, 102 FERC ¶ 61,345 (2003), and 104 FERC ¶ 61,201 (2003).

[18] Joint Stipulation (October 3, 2002).

[19] Prior to the hearing three other issues were to be determined at the hearing. However, the I.D. deferred ruling on these three issues. After issuance of the I.D., the parties filed a motion to withdraw these issues. The ALJ granted the motion on June 16, 2005, *see* 111 FERC ¶ 63,068 (2005). Thus, this order will address only the six issues described, and will not refer to the three other issues.

2. What is the level of adjustment necessary to bring the Heavy Distillate cut into line with the specifications for Platt's West Coast LA Pipeline Low Sulfur No. 2? What should be the effective date of the change in the Heavy Distillate cut price?

The I.D. describes the necessary adjustments to bring the Heavy Distillate cut into line with the specifications for Platt's West Coast LA Pipeline Low Sulfur No. 2. The effective date for the new valuation is February 1, 2000.

3. Whether the current method for valuing the West Coast Naphtha Cut is just and reasonable, and if not, what is the appropriate method for valuing the Naphtha cut? What should be the effective date of any change to the West Coast Naphtha cut?

The I.D. adopts the "Tallett" methodology, which is based on a regression analysis, to value West Coast Naphtha. The change will be on a prospective basis from the date this order is issued.

4. Whether the current method for valuing the West Coast VGO cut is just and reasonable, and if not, what is the appropriate method for valuing the VGO cut? What should be the effective date of any change?

The I.D. finds that this cut will be valued on the basis of Oil Pricing Information Service (OPIS) West Coast High Sulfur Vacuum Gas Oil weekly price. This change will be effective on a prospective basis.

5. Should the revised values for the cuts subject to the D.C. Circuit remand in *OXY* (Resid, Heavy Distillate and Light Distillate) be made retroactive to December 1, 1993?

The new valuations are retroactive to December 1993.

6. Are reparations an issue in this proceeding? If so, what reparations, if any, are appropriate?

The ALJ concluded that reparations are not an issue and cannot be awarded in this proceeding.

13. Exceptions were filed by the Eight Parties,[20] and six individual members of Eight Parties also filed separate exceptions on the Naphtha issue. Exceptions were also filed by Exxon Mobil Corp. and Tesoro Alaska Co., jointly (EMT), the TAPS Carriers, and Flint Hills Resources Alaska, LLC (Flint Hills).[21] Briefs opposing exceptions were then filed by all of them.

14. We will address the issues in the order set forth in the I.D.

Issue No. 1. *What is the Appropriate Method for Valuing the Resid Cut?*

15. Resid is the portion of the petroleum stream remaining after distillation of all other cuts at lower boiling points. Under the Quality Bank, Resid is any material that does not boil out until the temperature reaches or exceeds 1050œF.

16. The Commission had determined that Resid is best valued as a coker feedstock. A coker is "refinery equipment which breaks Resid down even further into lighter fuel products and a heavy residue, which might be asphalt at some plants, or other materials

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[20] The Eight Parties are BP America Production Company, BP Exploration (Alaska) Inc., (jointly BP), Conoco Phillips Alaska, Inc. (CPAI), OXY USA, Inc., Petro Star, Inc., State of Alaska, Union Oil Company of California (Unocal), and Williams Alaska Petroleum, Inc. (Williams).

[21] Flint Hills Resources purchased an Alaska refinery from Williams in 2004.

with differing uses."[22] As was noted in both *OXY* and *Exxon*, no active market exists for Resid which a value can be based on.[23] In *Exxon* the Court rejected the Commission's method for valuing Resid through specified proxies subject to certain adjustments

17. In the hearing order, the Commission stated that the Court was concerned "that the chosen proxy bear a rational relationship to the actual value of Resid."[24] Thus, in this proceeding, the ALJ was charged with the task of determining the appropriate method for valuing the Resid cut.

18. Before the hearing the parties stipulated how Resid should be valued. Specifically, they agreed that Resid should be valued as a coker feedstock by valuing the coker products minus the cost of producing these products using the following formula: "Resid = Before-Cost Value of coker Products - (Coking Costs * Nelson Farrar Index)."[25] The Stipulation provided that the Before-Cost Value is to be calculated using a 3-step process: (1) the product (Fuel Gas, Propane, Isobutane, Normal Butane, LSR, Naphtha, Heavy Distillate, VGO, and coke) yields are to be determined through the use of the Process Industry Modeling System, Version 11.0 (PIMS);[26] (2) values are to be determined for each; and (3) the product yields are to

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[22] *Exxon*, 182 F.3d at 36.

[23] *OXY*, 64 F.3d at 688; *Exxon*, 182 F.3d at 42.

[24] 97 FERC at 61,652.

[25] Joint Stipulation of the Parties, filed October 3, 2002, at 1 (Joint Stipulation).

[26] "PIMS is a standard, commercially available computer model licensed by Aspen Technology, Inc., that is used to simulate refinery operations." Exhibit PAI-1 at 11. The PIMS model yield for ANS Resid can be found in Exhibit PAI-5.

be multiplied by the product prices and the resulting values are added together.[27]

19. Further, the Coking Costs would be given a "single value," but the parties failed to agree on what that value should be.[28] While not agreeing as to the "base year" the parties agreed that the Nelson Farrar Index to be used is a ratio of the Nelson Farrar Index (Operating Indexes Refinery) for the year in which the value is sought and the Nelson Farrar Index (Operating Indexes Refinery) for the base year.[29]

20. The ALJ addressed a number of issues concerning the before-cost value and coker costs that were in dispute. We affirm the ALJ's findings regarding these issues subject to one modification.

A. *Coker Cost Issues*

21. The parties adopted as the standard that the coker would have to be sized to be able to process 40,000 barrels per stream day of Resid with an 87 percent annual utilization rate.[30] However, the ALJ was presented with two diametrically opposite proposals on how to determine the cost of a typical delayed coker,[31] one by EMT and one by Eight Parties. The witness for EMT, Mr. John H. Jenkins, presented a detailed itemized cost study that identified the direct and indirect costs for each of the items of

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[27] Joint Stipulation at 1-2.

[28] *Id.* at 3.

[29] *Id.*

[30] I.D. at P 957, 960.

[31] A "delayed coker" is the term used for newer cokers. These delayed coking units use a relatively higher severity thermal cracking process. Delayed coking has been used by many refiners for bottom of the barrel up-gradation, because it can handle even the heaviest of residues.

equipment that would be required for the coker and the related downstream refinery units necessary to process the coker products to bring them up to the quality specifications of the Quality Bank reference products. On the other hand, Eight Parties' witness, Mr. John B. O'Brien, based his coker cost estimate on the relationship between plant capacity and plant cost reflected in his firm's coker cost curves.

22. The ALJ found neither O'Brien's nor Jenkins's "overall approach" satisfactory stating:

> I am troubled with the complexity and subjectivity of Jenkins's itemized list of components. Also, I question whether Jenkins expended the effort necessary, described by Gary, to actually do a detailed estimate which I could accept as accurate.[32] While I am troubled by O'Brien's lack of detail, in the final analysis, as will be seen below, I can adjust O'Brien's estimate in ways which satisfy me that the end result is as close a cost estimate as possible given the limitations of what can be accomplished in the hypothetical world in which we are trying to determine the cost of a Delayed Coker. I can find no way of modifying Jenkins's estimate to satisfy me that the end result is accurate and fair to all parties. In sum, there is nothing in Jenkins's testimony or Exxon's arguments that convinces me that Jenkins's itemized cost approach is objective or accurate enough to satisfy the needs of using it as part of the formula which will result in a determination of

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[32] Jenkins admits that he and Dickman only spent three man weeks on "engineering" the project. Transcript at 2762, 2770. However, he further stated that, to do a detailed estimate to the level of which Gary spoke, *i.e.*, 30 percent engineering, would take "four to six months." *Id.* at 2770.

the value of Resid. Therefore I hold that, as modified below, O'Brien's cost curve should be used.[33]

23. Parties take exception to several of the ALJ's modifications and additions to O'Brien's cost estimate.

1. *Capital Costs*

24. The parties agreed that the coker capital costs consist of (a) the direct costs, referred to as "Inside Battery Limits" or "ISBL," which include the costs of the coker itself and related downstream refinery units, and (b) the indirect costs, referred to as "Outside Battery Limits" or "OSBL," which include facilities necessary to support refinery processing units such as storage facilities, steam generation systems, etc., and finance costs.[34]

a. *ALJ's Findings*

25. The ALJ found that Mr. O'Brien's ISBL cost estimate omitted the costs of several items of equipment that were included in Mr. Jenkins's itemized approach. In particular, the ALJ found that a typical delayed coker, *i.e.*, a coker capable of processing 40,000 barrels per stream day of Resid, would be expected to have: (1) four coke drums rather than the two assumed by Mr. O'Brien;[35] (2) automatic deheading equipment for safety and efficiency;[36] (3) adequate coke handling equipment, *i.e.*, "coke pit and crane, chutes and conveyor system, and covered storage," rather than the concrete "pad" and front end loader

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[33] I.D. at P 1184.

[34] Exxon Initial Brief at 59-60; Eight Parties Initial Brief at 28.

[35] I.D. at P 1194.

[36] I.D. at P 1199.

assumed by Mr. O'Brien;[37] and a coker gas plant.[38] The ALJ determined that these costs be added to Mr. O'Brien's base cost curve.

26. As to the determination of the OSBL cost estimate, the ALJ was presented with two approaches. Mr. O'Brien presented an approach using an average estimate for OSBL costs equal to 35 percent of the ISBL costs. Although Mr. Jenkins agreed that Mr. O'Brien's approach was typical, he presented a different approach which estimated the costs of the major process units needed to add a coker to an existing refinery, the costs of the additional storage facilities, steam generation systems, and cooling water systems that would be required to support the coker, and then applied a factor of 25 percent of the costs of the ISBL processing units to cover other OSBL costs. As both Mr. Jenkins and Mr. O'Brien agreed that the typical approach to be followed in calculating OSBL costs is to use a percentage of ISBL costs, the ALJ found that O'Brien's approach of using 35 percent of the ISBL estimate should be followed.

27. With regard to other remaining OSBL matters specifically addressed by the parties (storage costs, steam generation and cooling water facilities, and miscellaneous items), the ALJ found that O'Brien's suggestion that they be calculated by taking 35 percent of ISBL costs to be adequate when the modifications which the ALJ made in his ISBL estimate are taken into consideration.

b. *Exceptions*

28. Eight Parties argue that the ALJ erred by adding these capital costs to O'Brien's cost curve. They

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[37] I.D. at P 1204.

[38] I.D. at P 1208.

state that these additions result in a Resid value even below that proposed by EMT, who had advocated a low Resid value. In addition, Eight Parties argue that the costs for automatic deheading presented by Mr. Jenkins, which the ALJ adds as an ISBL cost, lack a relevant vendor quote, incorrectly assume top and bottom deheading systems, and are an estimate for a retrofit to an existing coker which is not consistent with Jenkins's assumption in his estimate for a new coke drum installation. Also, Eight Parties contend that basic coke handling costs, *i.e.*, costs for a coke pad and front loader, were already included in O'Brien's cost curve ISBL number, and that anything after the initial handling is covered by his OSBL estimate. Further, Eight Parties argue that O'Brien testified that he does not consider the gas plant to be a part of the ISBL and that since there already exists a gas plant at the refinery to which the delayed coker is to be added, there is no ISBL cost associated with the coker gas plant, but only some cost for processing the coker gas in the existing gas plant.

29. Also, Eight Parties argue that the inclusion of coke handling and coker gas plant costs in the ISBL costs results in a double counting of those units, at least when applied to O'Brien's cost curve and OSBL cost estimate. They state that O'Brien used a higher than normal OSBL multiplier of 35 percent to account for a number of costs such as coke handling costs not included in the cost curve ISBL cost and to include that portion of the existing coker gas plant credited to the delayed coker for its joint use of the facility. Eight Parties argue that the problems with the costs for the coke handling and coker gas plant are easily remedied by removing them from the ISBL costs and treating them as included in the OSBL cost

amount calculated by using O'Brien's 35 percent multiplier.

30. EMT argue that the ALJ erred by failing to adjust O'Brien's OSBL cost calculation to include costs of storage because O'Brien made no allowance for storage costs.

c. *Opposing Exceptions*

31. EMT contend that Eight Parties' arguments are without merit as the evidence demonstrates that the four items of equipment that the ALJ added to Mr. O'Brien's coker cost estimate are necessary components of any modern coker. Nor, they argue, is there any valid basis for the concern that the coker handling equipment costs or the coker gas plant costs might be overstated or double counted under the ALJ's rulings. EMT state that the record indicates that O'Brien did not include either of these in his ISBL or OSBL estimates.

32. With regard to EMT's argument that additional storage costs should be included in OSBL, Eight Parties argue that they are unsubstantiated and that the factual record evidence demonstrates that refiners do not add new tankage, *i.e.*, storage, but rather utilize existing tankage when adding a coker to an existing refinery. Also, they argue that storage costs do not constitute processing costs and to include such costs for the Resid valuation would result in the Resid cut of the TAPS Quality Bank being valued inconsistently with other Quality Bank cuts.

d. *Commission Determination*

33. We affirm the ALJ's decision with modification to the ruling on automatic deheading equipment. Eight Parties do not challenge the ALJ's findings that these four additional items of equipment were not included

in O'Brien's estimate of the ISBL costs of the coker. Instead, Eight Parties argue that the addition of these costs increases O'Brien's coker cost estimate higher than what Jenkins estimated and that, therefore, the additions must be invalid. As the evidence demonstrates, however, the four items of equipment that the ALJ added to Mr. O'Brien's coker cost estimate are necessary components of any modern coker and Mr. O'Brien did not account for them in his estimate.

34. The issue with regard to the amount of drums in a "typical" coker is how many drums are needed to process 40,000 barrels/stream day of ANS Resid. Although we agree with the ALJ that one could design a 2-drum coker to do just that,[39] we also agree that such a coker would not be typical. Evidence was presented demonstrating that only one 2-drum coker exists in the country with the ability to process 40,000 barrels/day of Resid[40] and that the range of all the 4-drum cokers in the country range from 17,500 bbl/d to 80,000 bbl/d. Therefore, we find that the ALJ was correct to find that the cost of a typical coker that can process 40,000 barrels/day should be based on a 4-drum, not 2-drum coker.

35. With regard to the automatic deheading equipment, the evidence demonstrated that most, if not all, cokers built in the last ten years had automatic deheading equipment.[41] In fact, O'Brien could not identify any installed coker since 1996 which did not have automatic deheading equipment.[42] Therefore, we

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[39] I.D. at P 1194.

[40] EMT-167 at 19-21.

[41] I.D. at P 1197; Jenkins, Transcript at 3894.

[42] Transcript at 374.

agree that deheading equipment should be added to the ISBL estimate. We disagree, however, on the ALJ's adoption of Jenkins's position that a refinery would probably include automatic deheading equipment for both the top and the bottom heads simply because the incremental cost was low. As Jenkins admitted, the preponderance of automatic deheading systems are bottom systems and not top systems.[43] Therefore, we find that a typical coker would only have bottom automatic deheading equipment.

36. As to the coke handling equipment, O'Brien only included in his cost estimate a "coke pad" and a "front end loader."[44] However, Jenkins demonstrated that a typical coker, and particularly one on the West Coast, would include coke handling equipment consisting of a coke pit and crane, appropriate chutes and conveyor system, and covered storage to move and store the coke at the refinery and meet environmental requirements.[45] In fact, O'Brien admitted that, though a coke pad and front-end loader might have been acceptable in 1996, he did not "think it would be today."[46] He further admitted that he could not identify one coker currently operating on the West Coast with just a coke pad and front-end loader.[47] Therefore, we agree with the ALJ's finding that a typical coker would include all the equipment described by Jenkins and that O'Brien's estimate should be supplemented with the cost of the equipment not included in O'Brien's estimate.

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[43] Transcript at 3990.

[44] I.D. at P 1204 & n.454 (citing PAI-58 at 15).

[45] EMT-146 at 33-34; EMT-212 at 2-3.

[46] Transcript at 331-32.

[47] *Id.*

37. Also, we agree with the ALJ's finding that the costs of the coker gas plant should be included in ISBL and that O'Brien did not adequately provide for these costs in his estimate. Both Jenkins and Gary, author of the Gary and Handwerk Treatise,[48] presented testimony that the coker gas plant should be included in ISBL.[49] Further, O'Brien admitted that the base refinery on which he based his analysis of the coker costs did not have a catalytic cracking unit[50] and that "[i]f... there was no cat cracker in the refinery, then the gas plant would have to be built for the coker."[51] In any event, the evidence demonstrated that gas plants are physically inside the battery limits as they are normally located as close as possible to the fractionator of the coker so that that the heat from the fractionator can be used in the plant.[52] With regard to Eight Parties' argument that the costs of the gas plant were included in O'Brien's OSBL estimate, we find it unpersuasive. O'Brien admitted that his list of items included in his OSBL cost estimate did not include the coker gas plant.[53] Moreover, the evidence demonstrated that if it were included, the OSBL cost estimate was not adequate to cover both the coker gas plant and the other OSBL cost items.[54]

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[48] James H. Gary & Glenn Handwerk, Petroleum Refining, Technology and Economics (4th ed. 2001).

[49] EMT-37 at 36; EMT-191 at 4.

[50] Transcript at 288, 1322-23.

[51] Transcript at 421; I.D. at P 1034.

[52] EMT-146 at 36-37; EMT-167 at 24-26; EMT-191 at 5-6; Transcript at 1327-28, 3493, 4084, 4093.

[53] I.D. at P 1205 n.455, 1208 n.459; O'Brien Transcript at 439-40.

[54] I.D. at P 1208 n.459.

38. Further, we find that OSBL should include appropriate storage costs for storing the Resid as a coker feedstock and for the storage associated with downstream units. Accordingly, we agree with the ALJ's adoption of O'Brien's OSBL methodology for accounting for storage costs. The evidence demonstrated that Gary and Handwerk suggested calculating OSBL by estimating 20-25 percent of ISBL,[55] and that O'Brien increased this percentage to 35 percent. The evidence also suggested that storage costs are usually estimated separately, along with some other items, from the OSBL costs. Thus, the 20-25 percent of ISBL to estimate OSBL would have to be increased to account for the inclusion of storage costs in OSBL. O'Brien's initial 35 percent estimate was increased as a result of the ALJ's rulings which increased the ISBL estimate. As the ALJ stated, "if no change is made in the manner in which he calculated the OSBL costs, his OSBL estimate will have a concomitant increase. This is especially true as I have held that the coker gas plant costs should be treated as an ISBL cost and not included in the OSBL estimate."[56] As a result we find that the increase in percentage of ISBL to estimate the OSBL costs, *i.e.*, 35 percent of ISBL instead of 20-25 percent of ISBL, coupled with the ALJ's decision to increase the ISBL costs, adequately provides for storage costs.

2. *West Coast Location Factor*

a. *ALJ's Findings*

39. A location factor is an adjustment factor used to translate a construction cost estimate developed for a specific project in a specific location (usually the U.S. Gulf Coast) to obtain a cost estimate for the same

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[55] PAI-1 at 24; Exxon Initial Brief at 95.

[56] I.D. at P 1211.

project in different parts of the country under the assumption that the cost to build a similar facility will vary depending on where it is located.[57] The ALJ acknowledged the parties' apparent agreement that West Coast Resid, as opposed to the Resid in the U.S. Gulf Coast, should be valued on a West Coast basis, and that, generally, the prices on the West Coast tend to be higher than those on the Gulf Coast. The ALJ discounted O'Brien's coker cost curve for the value of West Coast Resid because it was geographically "generic," *i.e.*, O'Brien's conceptualized refinery with the added Coke was not located at a specific geographical location (neither West Coast nor Gulf Coast), and did not take into consideration higher West Coast costs. However, the ALJ did agree with Eight Parties that the location factor used should not be based on the cost of building and operating a Los Angeles refinery/coker. Since the refinery/coker is located on the West Coast without being focused on a specific geographical site, the location factor should be generic to that Coast. The ALJ decided upon a location factor of 1.27, which he derived by averaging the location factor for all 27 refineries on the West Coast.[58]

b. *Exceptions*

40. Eight Parties argue that a location factor should not be used. They state that the record indicates that location factors are highly subjective with no consistent pattern. Further, they argue that the only empirical data in the record demonstrating that the cost of a delayed coker on the West Coast when compared on an equivalent basis with the cost of a delayed coker on the Gulf Coast is lower. They assert

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[57] Eight Parties Initial Brief at 138.

[58] *See* Exhibit EMT-208.

that such data underscore and justify O'Brien's use of a generic cost curve without applying any location factor.

41. If a location factor is required, Eight Parties argue that the ALJ erred by using a location factor that is too high. First, they argue that the ALJ's location factor of 1.27 falls within the 1.26 to 1.30 range that EMT witness Jenkins applied in his detailed cost estimate that the ALJ rejected. Second, they argue that the ALJ's method of averaging is contrary to his holding that the location factor should represent a West Coast refinery and not a Los Angeles refinery. They state that the preponderance of the 27 refineries used in the ALJ's calculation are located in California, with all but four of those refineries located in the Los Angeles and San Francisco Bay area.[59] Moreover, they argue that since both Los Angeles and San Francisco have the same location factor of 1.35, 19 of the 27 refineries thus have a location factor that is the location factor used for Los Angeles,[60] resulting in a location factor weighted as if Los Angeles were the site.

42. Eight Parties argue that a location factor is not weighted by the number of facilities in a particular location. Therefore, to reflect a true West Coast generic location factor, it would be more appropriate to simply average the location factor for each refining

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[59] Footnote 473 in Initial Decision P 1238 lists the 27 refineries. The four California refineries not located in the Los Angeles and San Francisco Bay area are: Equilon (Bakersfield, CA); Kern (Bakersfield, CA); San Joaquin (Bakersfield, CA); and Trico Refining (Oildale, CA).

[60] Besides the three Bakersfield, CA and the Oildale, CA refineries, the other four are the three Washington State refineries and one Oregon refinery listed in footnote 473.

region on the West Coast. The result would be a location factor of 1.21 based on three location factors: 1.35 for Los Angeles and San Francisco, 1.20 for the Bakersfield and Oildale, CA refineries, and 1.08 for the Washington and Oregon refineries.

c. *Commission Determination*

43. We agree with the ALJ's location factor of 1.27. The evidence demonstrated that construction costs, labor costs, and permitting costs are generally higher on the West Coast than on the Gulf Coast.[61] Therefore, a location factor is appropriate on the West Coast. As to the 1.27 location factor adopted by the ALJ, we also find it "the most logical."[62] The ALJ's simple averaging of the location factors for all 27 of the West Coast refineries takes into account all of the available data and appropriately gives proportionately greater weight to those West Coast locations that have the larger number of refineries. We do not believe that averaging the location factor for each defining region, as Eight Parties suggest, accounts for these factors.

3. *New Evidence*

44. Flint Hills raises a number of issues regarding the ALJ's Resid valuation rulings based on evidence that was not introduced in the hearing or on new proposals that were not fully considered in the hearing.

45. We find that considering new evidence that is not in the record is in violation of our Rules. Section 18 C.F.R. 385.214(d)(3)(ii) states that "a later intervener must accept the record of the proceeding as the record was developed prior to the late intervention." As a late intervener, Flint Hills must accept the

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[61] *See, e.g.*, EMT-116 at 7; EMT-169 at 6; EMT-146 at 13.

[62] I.D. at P 1240.

record as it was. Thus, we reject any new evidence or new proposals it sought to introduce.

B. *Just and Reasonable Resid Value*

46. Eight Parties, as does Flint Hills, argue that the Resid value produced by the ALJ is not just and reasonable. Essentially, they argue that the ALJ must have erred because the resulting coker cost, which has an inverse relationship to the value of Resid, is higher than the coker cost estimate that was presented by Jenkins, the witness for EMT. In addition, they argue that the ALJ erred by not calculating the precise Resid value that results from the rulings.

47. We disagree. We acknowledge that, as Eight Parties point out, the coker costs based on the ALJ's rulings may be higher than Jenkins's estimate.[63] However, Eight Parties have not shown that the ALJ's methodology for calculating coker costs, except as to the automatic deheading equipment, was incorrect. For instance, as to capital costs, discussed above, the record establishes that Eight Parties' coker cost estimate presented by O'Brien simply did not include or factor in certain equipment that a "typical" coker should have. Therefore, the ALJ added the unaccounted-for equipment to O'Brien's cost estimate. To argue now that regardless of the fact that O'Brien admits that he did not include certain equipment, the ALJ's methodology should be result-oriented and, therefore, should be modified so that it does not result in costs that exceed Jenkins's estimate would be to ignore the evidence and testimony presented in this hearing. In any event, Jenkins's and O'Brien's cost estimates were not the only estimates presented during

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[63] Eight Parties Appendix B to Brief on Exceptions.

the hearing.[64] In fact, O'Brien presented evidence which suggests that the coker cost estimate would be substantially higher than O'Brien's cost estimate as modified by the ALJ.[65] Therefore, Jenkins's coker cost estimate did not establish the "just and reasonable" ceiling that Eight Parties advance in their exceptions.

48. Secondly, we find that the ALJ was not required to calculate the precise Resid value, much less that such an omission automatically results in an unjust and unreasonable decision. In this instance, the ALJ ruled on a methodology and the specific components thereto, and directed the TAPS Carriers to file revised tariff sheets in accordance with the rulings.[66] Because the ALJ ruled on all the issues that were disputed between the parties, there was no need, as helpful as it may be, to calculate the precise Resid value.

49. Accordingly, we affirm that the ALJ's Resid value was based on a just and reasonable methodology, and the resulting Resid value is just and reasonable.

C. *Clarifications*

50. TAPS Carriers have requested clarifications relating to the coker product value and coker cost. As the ALJ found that O'Brien's cost curve should be used to value Resid, we clarify that the TAPS Carriers must use this approach along with O'Brien's cost figures unless the ALJ specifically referenced otherwise, *e.g.*, adopted Jenkins's estimate for a specific cost.

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[64] *See* PAI-10.

[65] *Id.*

[66] I.D. at P 3084.

Issue No. 2 *What is the level of adjustment necessary to bring the Heavy Distillate cut into line with the specifications for Platt's West Coast LA Pipeline Low Sulfur No. 2? What should be the effective date of the change in the Heavy Distillate cut price?*

A. *The I.D.*

51. Pursuant to the Quality Bank methodology, the price for Heavy Distillate on the West Coast was set at Platt's Oilgram Price Report (Platt's) reported figure for West Coast High Sulfur (0.5 percent) Waterborne Gasoil. However, effective November 1, 1999, Platt's discontinued reporting that price but introduced Waterborne assessments for Gasoil reflecting a sulfur content of 0.05 percent.

52. The Commission accepted the parties' agreement to use Platt's West Coast LA Pipeline LS No. 2 (0.05 percent) as the appropriate proxy for the West Coast Heavy Distillate cut, but there was disagreement among the parties on the correct level of adjustment necessary to bring the TAPS Heavy Distillate cut into line with the new reference price with its much lower 0.05 percent sulfur specification. The November 2001 Hearing Order directed that the issues be determined at the hearing, as well as the effective date of any new valuation.

53. Consistent with the positions previously taken, at the hearing all parties stipulated to value West Coast Heavy Distillate at the published Platt's West Coast LA Pipeline LS (0.05 percent) No. 2 Fuel Oil price, less appropriate deductions.[67] The parties agreed that deductions should include the cost of desulfurizing to meet the 0.05 percent sulfur specifications in the new proxy, but did not agree as to the cost of

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[67] *See*, Joint Stipulation at 3.

desulphurization. They also disagreed as to whether there should also be a logistics adjustment to the reference price.[68] They also agreed on February 1, 2000, as the effective date for this new valuation, with refunds to be made to that date.

54. The ALJ accepted the adjustment proposed by Mr. O'Brien on behalf of Eight Parties subject only to the use of a West Coast location factor to reflect the fact that costs on the West Coast are higher than the Gulf Coast costs that Mr. O'Brien used in calculating his sulfur processing costs.[69] The ALJ rejected the logistic adjustment, first on the grounds it was outside the scope of the Heavy Distillate valuation issues referred by the Commission and, hence, was not properly before the ALJ.[70] However, the ALJ also found that Eight Parties had (1) "failed to satisfy their burden of showing" that any such adjustment "was warranted", and (2) failed to show that the particular adjustment of 1.1 cents per gallon that they proposed was warranted.[71] The ALJ followed the stipulation of a February 1, 2000 effective date for the new valuation.

B. *Exceptions to I.D.*

55. Eight Parties argue that a West Coast location factor should not be applied to Mr. O'Brien's Gulf Coast cost estimates. Eight Parties also argue that the ALJ erred in rejecting their proposed "logistics adjustment," because first, their logistic adjustment was

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[68] The adjustment reflects the costs incurred in transporting product inland to the pipeline from its arrival point at the harbor. I.D. at P 1443.

[69] I.D. at P 1416-1442.

[70] I.D. at P 1447.

[71] I.D. at P 1448.

within the scope of the Commission's reference to the ALJ, and second, that their logistics adjustment is "warranted for consistency purposes" and that the amount of the proposed adjustment was reasonable.

56. Flint Hills excepts to the effective date ruling. It argues that notwithstanding the Joint Stipulation's effective date of February 1, 2000, for the new West Coast Heavy Distillate prices, the Commission should make the new West Coast Heavy Distillate valuation effective only on a prospective basis.

57. TAPS Carriers do not take issue with the ALJ's decision regarding the appropriate sulfur processing cost adjustment to the Heavy Distillate cut but urge the Commission to clarify three narrow cost issues. TAPS Carriers point out that the ALJ adopted the costing approach proposed by Mr. O'Brien but did not specifically adopt Mr. O'Brien's 20 percent capital recovery factor, or the methodology that he used in calculating fixed operating costs, and variable operating costs. TAPS Carriers request that the Commission confirm that Mr. O'Brien's 20 percent capital recovery factor, fixed operating costs, and variable operating costs should be used in calculating the sulfur processing cost adjustment for the West Coast Heavy Distillate cut.

C. *Commission Rulings*

1. *Sulfur Processing Costs Adjustment*

a. *Capital Costs*

58. The ALJ held that applying O'Brien's cost curve approach to determine the sulfur processing cost adjustment added a certain consistency to the Quality Bank calculations as such an approach was also used to determine the value of Resid. Taking all of the evidence into consideration, the ALJ found this method to be appropriate, and the result to be just and rea-

sonable. TAPS Carriers assert that although the I.D. does not expressly adopt the 20 percent capital recovery factor in connection with the valuation of the Heavy Distillate component, it does generally accept O'Brien's valuation approach,[72] which includes a 20 percent capital recovery factor.[73] TAPS Carriers argue that the Commission should confirm that a 20 percent capital recovery factor should be used or, if not, specify what capital recovery factor should be used.

59. We find merit in TAPS Carriers' request particularly since no party opposes the request and EMT urges the Commission to grant it. Accordingly we direct that a 20 percent capital recovery factor should be used in the valuation of the Heavy Distillate component as used in witness O'Brien's valuation approach.[74]

2. *Location Factor*

60. The ALJ stated that with respect to the location factor issue, the parties made exactly the same argument as they did with respect to the use of a location factor on the Resid estimates. As to Resid, the ALJ determined that a location factor should be used inasmuch as the record clearly supported a conclusion that construction costs were higher on the West Coast, that the fact that a "specific" site for construction of the plant on the West Coast was irrelevant, and that a just and reasonable location factor to be used was 1.27. For the reasons stated in

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[72] I.D. at P 1419.

[73] *See* Exhibit PAI-19.

[74] We also confirm TAPS Carriers' unopposed request that Mr. O'Brien's methodology for calculating fixed operating costs and variable costs should be used in calculating the sulfur processing costs adjustment.

that discussion, the ALJ found that a location factor is appropriate to be used as to the Heavy Distillate cut and the appropriate location factor to be used is 1.27.

61. On exceptions, Eight Parties assert that the ALJ used the location factor of 1.27 to transform O'Brien's Gulf Coast hydrotreater capital costs to a West Coast location. Eight Parties state that accordingly, they incorporate the same arguments they raised concerning the use of the same location factor to determine the value of Resid. Eight Parties stipulate that whatever the Commission rules with respect to the location factor for the Resid valuation should be applied identically to the West Coast Heavy Distillate valuation.

62. As discussed in our evaluation of the application of a West Coast location factor to value Resid, we find the ALJ's adoption of a 1.27 West Coast location factor to determine the value of the Heavy Distillate cut to also be appropriate. Because Eight Parties stipulate that our ruling on the location factor for the Resid cut should apply to the West Coast Heavy Distillate cut, we need not address the issue again here, and thus, apply the 1.27 West Coast location factor to the Heavy Distillate cut. In any event, based on the record and evidence, we find that a West Coast location factor should be applied to the Heavy Distillate cut.[75] Accordingly, we affirm the ALJ's finding that a West Coast location factor of 1.27 is reasonable and should be used.

3. *Logistics Adjustment*

63. In their initial brief, Eight Parties argued that "the Heavy Distillate reference price requires a

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[75] I.D. at P 1237.

logistics adjustment to bring it onto a consistent basis with all of the other liquid Quality Bank cuts" and that the 1.1 cents/gallon is "the average of costs incurred in transporting product inland [sic] to the pipeline from its arrival point at the harbor."[76] They suggested that because the pipeline reference price is inflated by this cost factor, the costs of transportation must be deducted in order for the value of Heavy Distillate to be set at the same waterborne level as the other liquid cuts.[77]

64. The ALJ found that the question of whether the Heavy Distillate reference price should be adjusted by the cost of transporting the product from the harbor to the pipeline was not before him. The ALJ stated that even if the issue were before him, he would find that Eight Parties failed to satisfy their burden by showing that it was warranted, in general, nor had they shown that the adjustment of 1.1 cents/gallon was just and reasonable.

65. On exceptions, Eight Parties assert that to the extent the ALJ decided that the proposed logistics adjustment was not before him based on EMT's argument, the ALJ incorrectly considered EMT's argument because EMT had waived that argument. Eight Parties contend that EMT's failure to object to the scope of these proceedings until its post-trial brief, and its decision to present testimony on the proposed logistics adjustment, constitutes a waiver of the objection. Accordingly, Eight Parties state, in making his decision, the ALJ should not have considered EMT's post-hearing assertion that the Heavy Distillate logistics adjustment was not before him.

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[76] Eight Parties Initial Brief at 150-152.

[77] *Id.*

66. Eight Parties state that the Court in *OXY* unequivocally stated that the "FERC must accurately value all cuts—not merely some or most of them—or it must overvalue or undervalue all cuts to approximately the same degree."[78] Eight Parties submit that the ALJ correctly stated that Eight Parties' primary justification for proposing a logistics adjustment is to achieve consistency in the location at which Quality Bank cuts are valued.[79] Eight Parties argue that he then proceeds, however, to state incorrectly that such an adjustment is not necessary because no such consistency currently exists.[80]

67. Eight Parties argue that all four gas plant products or natural gas liquids are consistently valued based on the available market for those products—pipeline on the Gulf Coast, and truck/rail on the West Coast. They argue that as for the liquid products, all five Gulf Coast liquid products are consistently valued on a waterborne basis. They further argue that on the West Coast, Naphtha, Light Distillate and VGO are and will continue to be valued on a waterborne basis. Accordingly, in order to achieve complete consistency with respect to all liquid Quality Bank products, Eight Parties assert that the remaining liquid products, Resid and Heavy Distillate, must be valued on a waterborne basis.

68. Eight Parties maintain that their proposed logistics adjustment of 1.1 cents/gallon represents the average of costs incurred in transporting relevant product inland to the pipeline from its arrival point at the harbor. Specifically, Eight Parties submit, as

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[78] 64 F.3d at 693.

[79] I.D. at P 1448.

[80] *Id.*

to the product delivered into Los Angeles harbor, which is the relevant location for this discussion, "the added value at the pipeline hub largely reflects the logistics costs of moving product from a tanker or barge. . . into the Kinder Morgan pipeline terminal at Watson, California."[81]

69. Eight Parties state that the costs incurred in transporting product to the pipeline from the harbor consist generally of cargo inspection, dock and wharf fees, terminal charges and pipeline tariff charges.[82] Eight Parties submit that to determine what costs are actually incurred in the marketplace, and where within this range the logistics adjustment should fall, BP's witness Ross calculated the actual observed waterborne/pipeline differentials between West Coast Waterborne Low Sulfur Gasoil and Platts West Coast LA Pipeline No. 2.[83] Eight Parties assert that while these two products are not identical, Platts specifically stated that they are considered interchangeable.[84] Eight Parties further submit that as further support for the market-realized transportation costs, Ross also calculated the waterborne/pipeline differentials in reported prices for the similarly situated products of regular gasoline and jet fuel.[85]

70. Eight Parties maintain that each of the three waterborne/pipeline differentials calculated by Ross supports their 1.1 cents/gallon proposed logistics adjustment. They assert that the annual average be-

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[81] Exhibit EMT 102 at 7-10.

[82] *See* Exhibit BPX-1 at 13.

[83] Exhibit BPX-1 at 13:10-11.

[84] Exhibit BPX-1 at 10:1-2; Exhibit BPX-55 at 1-2; Transcript 1780:3-9.

[85] Exhibit BPX-1 at 13:9-13.

tween West Coast Waterborne Low Sulfur Gasoil and Platts West Coast LA Pipeline No. 2 shows that the waterborne price is almost precisely 1.1 cents/gallon less than the pipeline price.[86] Eight Parties state that Christopher Cavanagh, in support of Eight Parties, concluded that there is a statistically significant differential between West Coast Waterborne Low Sulfur Gasoil and West Coast LA Pipeline No. 2 and that differential is consistent with the proposed logistics adjustment of 1.1 cents/gallon. (Exhibit BPX-60 at 6:9-12,[87] BPX-60 at 11:17; BPX-60 at 9:11-13; BPX 60 at 9:15-17; BPX-60 at 9:17; and BPX 60 at 9:13-17.)

71. Eight Parties conclude that their proposed logistics adjustment to the Heavy Distillate reference price is necessary to achieve the consistency that the D.C. Circuit requires and the non-refuted evidence shows that the proposed 1.1 cents/gallon adjustment is just and reasonable.

72. We affirm the ALJ's decision not to accept the proposed 1.1 cents/gallon logistic adjustment. First,

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[86] *See* Exhibit BPX-3. The first two months of data for the reported West Coast Waterborne Low Sulfur Gasoil were discarded when making this calculation because they appear to be distorted relative to the remainder of the time period. This distortion likely reflects start-up issues associated with the reporting of this product, which began in November 1999. *See* Exhibit BPX-1 at 14:12-14.

[87] Eight Parties argue that although Pavlovic testified that there are no systematic differentials between West Coast Waterborne Low Sulfur Gasoil versus Platts West Coast LA Pipeline No. 2, waterborne versus pipeline gasoline or waterborne versus pipeline jet fuel (Exhibit EMT-102 at 16:3-4), Pavlovic is wrong. As Cavanagh pointed out, "Dr. Pavlovic uses an inappropriate statistical methodology to test whether there is a statistically significant difference between West Coast waterborne and pipeline prices." Exhibit BPX-60 at 5:21-22.

the ALJ correctly held that the logistic adjustment proposed by Eight Parties was not within the scope of the issues referred to the ALJ by the Commission. The November 2001 Hearing Order directed that the issue relating to Heavy Distillate to be addressed in this proceeding is "the level of the sulfur processing adjustment necessary to bring the TAPS Heavy Distillate cut into line with the [new reference] price."[88]

73. As explained above, although the parties agreed on the replacement product when Platt's ceased publication of the price that the Commissions had previously designated as the West Coast reference product for the Heavy Distillate cut, the parties were unable to reach agreement on the amount of the costs that would be incurred in bringing the sulfur content of the TAPS Heavy Distillate cut into line with the much lower sulfur level of the new reference product.[89] The disagreement was over the level of these costs. The sulfur processing cost adjustment did not include any logistics adjustment. Accordingly, the ALJ properly held that the logistics adjustment was not within the scope of the hearing.[90]

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[88] *Trans Alaska Pipeline System*, 97 FERC ¶ 61,150 at 61,650, 61,652 (emphasis added).

[89] *Trans Alaska Pipeline System*, 90 FERC ¶ 61,123 at 61,371.

[90] Whether or not EMT could be considered as waiving the argument that the adjustment was not within the scope of the hearing, this would not confer jurisdiction on the ALJ that was not given to him in the Commission's order establishing this consolidated hearing. *See Sierra Pacific Power Co.*, 104 FERC ¶ 61,223 at 61,782-83 (2003) (vacating ALJ's initial decision insofar as it addressed issues "beyond the scope of what we set for hearing"); *City of Freeport, New York v. Consolidated Edison Co.*, 91 FERC ¶ 61,003 at 61,012 (2000) (affirming ALJ ruling that issues not addressed in the Commission's hearing may not

74. Moreover, we agree with the ALJ, that even if this issue were before him, Eight Parties have not established that such an adjustment was warranted. Eight Parties assert that the adjustment is necessary "for consistency purposes" because "all liquid Quality Bank products" should be valued "on a waterborne basis." Eight Parties Br. at 86. However, there is no basis for Eight Parties' contention. The ALJ noted that even Eight Parties' witness, Ross, who sponsored the logistics adjustment, admitted that Heavy Distillate "is not the only liquid cut which is not valued on a waterborne basis."[91] Furthermore, the ALJ found that Eight Parties' claim that all " liquid cuts" are "consistently valued" by the Quality Bank "on a waterborne basis," was contrary to the record because "there is no consistency in where the cuts are valued; some are valued at truck/rail location, others at a pipeline, still others are valued on a waterborne basis."[92]

75. Finally, we agree with the ALJ's finding that Eight Parties failed to prove that this "proposed adjustment is warranted," particularly since the "proposed 1.1(/gallon adjustment is based, at least in part, on specious evidence." The ALJ cited to testimony by Ross that in many instances he had no reliable evidence to support his estimate of the costs he used in calculating costs incurred in transporting product inland to the pipeline from its arrival point at the harbor.[93] Accordingly, we agree that Eight Parties failed to prove that their proposed logistics adjustment was warranted.

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been considered by him), *reh'g denied*, 101 FERC ¶ 61,225 (2002).

[91] I.D. at P 1448.

[92] I.D. at P 1448.

[93] I.D. at P 1446.

4. *Effective Date*

76. The ALJ accepted the parties' stipulation of February 1, 2000 as the effective date for the new valuation, with refunds back to that date. Flint Hills excepts to that ruling and requests that the effective date of the new West Coast Heavy Distillate price should be on a prospective only basis from the date of the Commission's final order in this proceeding. Flint Hills asserts that while some parties may have stipulated to a February 1, 2000 effective date, Flint Hills was not a party to that stipulation, and is not bound by it. Flint Hills contends that under the filed rate doctrine and the teachings of *Arizona Grocery Co. v. Atcheson Topeka and Santa Fe Railway*,[94] the new price can be instituted on a prospective only basis.

77. We affirm the ALJ's ruling of a February 1, 2000 effective date for the new West Coast Heavy Distillate price. Flint Hills, which acquired Williams's Alaska refinery on March 31, 2004 was permitted to intervene in these proceedings by order dated April 20, 2004, after the hearing record had been closed, and the post-hearing briefing before the ALJ had been concluded. In these circumstances, Flint Hills is bound by the positions that Williams took in this litigation before the sale, including Williams's agreement to the Joint Stipulation. The Commission's rules expressly provide that "a late intervener must accept the record of the proceeding as the record was developed prior to the late intervention."[95] Thus, Flint Hills is barred from attempting to avoid the Joint Stipulation of all parties that "the effective date of the new West Coast Heavy Distillate price will be February 1, 2000." This is particularly appropriate

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[94] 284 U.S. 370 (1932) (*Arizona Grocery*).

[95] 18 C.F.R. § 385.214(d)(3)(ii) (2005).

here since all parties relied on the Joint Stipulation, and no evidence was presented on this issue except the stipulation.

78. Moreover, there is good reason for the February 1, 2000 effective date. In February 2000, the Commission accepted the parties' agreed-upon replacement product less the necessary sulfur processing cost. Because the parties could not agree on that adjustment, the Commission allowed the prior proxy price to continue to be used pending a final decision on the sulfur processing cost adjustment. That the new price might be applied on a retroactive basis was recognized by the Commission's February 2000 Order accepting the replacement product since it stated, "the issue of whether the new price should be applied on a retroactive basis" would be designated as an issue in this proceeding.[96] Thus, all parties were on notice that the new valuation might be applied on a retroactive basis, and the filed rate doctrine has no application.

Issue No. 3 *Whether the current method for valuing the West Coast Naphtha Cut is just and reasonable, and if not, what is the appropriate method for valuing the Naphtha cut? What should be the effective date of any change to the West Coast Naphtha cut?*

A. *Background*

79. As a result of the remand in *Tesoro*, the November 2001 Hearing Order set for hearing whether the existing valuation of the West Coast Naphtha cut was still just and reasonable, and if not, what was the appropriate method for valuing the Naphtha cut.

80. During the course of the hearing, two changes to the Naphtha cut reference price were initiated by

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[96] *Trans Alaska Pipeline System*, 90 FERC ¶ 61,123 at 61,372.

the QBA, which became issues in the hearing. Effective February 3, 2003, Platts began publishing a Gulf Coast Waterborne Heavy Naphtha price which was in addition to the Naphtha price assessment previously used as the proxy price for the Naphtha cut on both coasts. The Commission accepted and suspended tariffs that substituted the new price assessment for Heavy Naphtha for use in the Quality Bank on both the Gulf Coast and West Coast. Although all the parties appeared to support the use of the Platts Gulf Coast Heavy Naphtha price quote, since a number sought to have added to that price 1.5 cents per gallon as an "N+A"[97] adjustment thereto, the Commission consolidated that proposal with the ongoing hearings.[98]

81. The QBA, on June 18, 2003, filed a Notice setting forth his intention to use an average of separate Platts Gulf Coast Heavy Naphtha price quotes for barge and cargo transactions as the proxy price for the Naphtha cut. The Commission accepted this change and also consolidated this issue with the ongoing hearings.[99]

82. The ALJ ruled that the current method for valuing Naphtha was no longer just and reasonable and, that the replacement methodology, a regression-based formula recommended by EMT's witness Tallett

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[97] N+A refers to the volume percent of Naphthenes plus the volume percent of Aromatics. When a material is referred to as having a 40 N+A, it means that 40 percent of the material is Naphthenes and/or Aromatics. The most fundamental of the Naphthenes are benzene, toluene, and xylene. The adjustment would be based on a 0.154 adjustment for each percentage increase in N+A above 40 to a maximum of 50 N+A. I.D. at P 2749.

[98] *BP Pipelines (Alaska) Inc.*, 102 FERC ¶ 61,345 (2003).

[99] *Trans Alaska Pipeline System*, 104 FERC ¶ 61,201 (2003).

should be adopted on a prospective basis. The ALJ also ruled that the previously used Platts Gulf Coast Naphtha assessment should be replaced with Platts Gulf Coast Heavy Naphtha assessment for all Quality Bank purposes effective March 1, 2003. The ALJ rejected the proposed N+A adjustment noting that it could be raised again during the next phase of the proceedings.[100] Finally, the ALJ ruled that averaging the cargo and barge assessments as proposed by TAPS Carriers following the QBA's notice, established a just and reasonable Naphtha value, and should be made effective on August 17, 2003.

83. Briefs on exceptions on the Naphtha issues were filed by the State of Alaska, EMT, CPAI, Unocal/OXY, Williams, Petro Star, Inc., jointly BP Explorations Alaska Inc., BP America Production (BP) and Flint Hills.[101] Briefs opposing exceptions on

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[100] The ALJ rejected the proposal for the N+A adjustment but deferred a final ruling on it, as well as deferring ruling on certain intra-cut issues, as to which further hearings were to be held. Subsequently, the parties filed a motion in which the intra-cut issues were withdrawn, and the parties agreed that the ALJ could make a final ruling on the N+A adjustment issue on the existing record. On June 16, 2005 the ALJ issued an Initial Decision in Docket No. OR89-2-016, *et al.*, which reaffirmed his prior ruling rejecting the proposal for an N+A Adjustment, *see Trans Alaska Pipeline System*, 111 FERC ¶ 63,308 (2005). Briefs on Exceptions, and Briefs Opposing Exceptions were filed with respect to that Initial Decision. The N+A adjustment issue will be considered in a separate order, and this order will not address that issue.

[101] Flint Hills raises a number of issues regarding the ALJ's Naphtha valuation rulings based on evidence that was not introduced in the hearing or on new proposals that were not fully considered in the hearing. Both BP and EMT oppose Flint Hills's position. As a late intervenor, under section 18 C.F.R. § 385.214(d)(3)(ii) of the Commission's Rules, Flint Hills must

the Naphtha issue were filed by EMT, Unocal/OXY, Williams, Petro Star, Inc., and BP.

B. *Is The Present Method Just and Reasonable?*

1. *The ALJ's Findings*

84. The ALJ found that material changes in circumstances had occurred since the Commission determined, in 1993, that West Coast Naphtha should be valued on a Gulf Coast basis.[102] The ALJ stated that "the Commission has changed its policy and no longer refuses to consider adjusted proxy prices for ANS cuts. Moreover, virtually no ANS is being shipped to the Gulf Coast any longer; in fact, on the whole, ANS production has greatly diminished since 1993."[103] Further, since the parties have agreed that West Coast VGO will no longer be valued on a Gulf Coast basis, West Coast Naphtha would be the only ANS cut still valued on a Gulf Coast basis. Finally, the ALJ further stated that "it is clear that the restrictive California Air Resources Board (CARB) and reformulated gasoline specification have impacted the West Coast market."[104] Accordingly, for all these reasons, if not for any one reason alone, the ALJ concluded that circumstances have changed since the Commission's 1993 holding that warrant a change in the valuation of the West Coast Naphtha cut and the new valuation should be implemented on a prospective basis

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accept the record as it was. Accordingly, we deny Flint Hill's request that we consider new evidence that is not in the record or new proposals based on that evidence.

[102] I.D. at P 2664.

[103] *Id.*

[104] *Id.*

2. *Exceptions*

85. Unocal/OXY and Petro Star argue that the current method for valuing West Coast Naphtha is just and reasonable, and that no change in the existing method is warranted.

86. Specifically, Unocal/OXY argue that the ALJ used the wrong legal standard and focused on the wrong issue when he found that the West Coast and Gulf Coast markets for Naphtha were different and concluded that therefore Gulf Coast prices should no longer be used. First, they argue that those challenging the existing method to value West Coast Naphtha, *i.e.*, Exxon and ConocoPhillips, had the burden of proving that it was not just and reasonable. Unocal/OXY argue that the ALJ erred by shifting the burden onto the parties defending the existing methodology. Secondly, they argue that the issue was not merely whether the markets are different, but whether West Coast Naphtha has a higher value than Gulf Coast Naphtha. Unocal/OXY state that all the evidence relied upon in the I.D. on the latter issue is either inferential or reflects subjective expert opinion. They state that the different price series for products other than Naphtha were cited to infer that the West Coast value of Naphtha must be different than the Gulf Coast value. Unocal/OXY argue that the market structure evidence, discussion of refinery margins, refinery characteristics on the two coasts, trade and import considerations, and different gasoline grades were all used to infer what the West Coast Naphtha value might be but failed to prove what the West Coast value is. They conclude that absent evidence that West Coast Naphtha is undervalued by the current methodology, the ALJ erred in overturning the existing method.

87. Williams argues that in order to find the discontinuance of the Gulf Coast Naphtha price to value the West Coast Naphtha is unjust and unreasonable, one must establish changed circumstances based on three required steps: (1) material change in circumstances have occurred that require reviewing the valuation being used; (2) the material changed circumstance results in the existing valuation no longer being just and reasonable; and (3) the alternative is found to be reasonable. Williams asserts that none of these requirements have been met.

88. Williams states that the changed circumstance, that West Coast VGO will no longer be valued on a Gulf Coast basis, is immaterial and has nothing to do with the actual valuation of Naphtha. Williams asserts that while there is no published West Coast Naphtha price, it is still preferable to use a published intermediate product price without adjustment, rather than a formula, especially a type of formula not used to value any other Quality Bank cut on the West or Gulf coasts. Williams contends that the ALJ's statement supports rejection of the Tallett formula because the West Coast Naphtha cut is the only cut valued based on a regression formula and based on gasoline, a product made from a *number* of Quality Bank cuts (butane, isobutene, Light Straight Run, Naphtha, VGO and Resid) and that cannot be made without blending components made from other Quality Bank cuts.

89. Williams contends that the ALJ failed to recognize that the reasons for not applying the Gulf Coast Naphtha price to the West Coast apply equally to the Tallett methodology, because the formula used in the Tallett methodology is based on Gulf Coast price relationships that are applied directly to the West Coast.

Williams claims that the ALJ erred by failing to give any credence to the testimony that there is market linkage of the Gulf Coast and West Coast crude markets in light of Sanderson's testimony that "over the long haul, the price of crude oils on the two coasts are similar, very close to being the same over an annual average and longer periods of time. Therefore, I believe the Naphtha prices won't differ very much."[105]

90. Williams submits that the ALJ recognized and accepted witness Sanderson's market linkage position, but the ALJ ignored his own conclusions proving that the market linkage exists. Williams concludes that if there is no market linkage, then there is no way that the Tallett formula can be used since it applies a Gulf Coast relationship to the West Coast.

91. Williams argues that the ALJ ignored the fact that petrochemical demand on the Gulf Coast makes up approximately 15 percent of Gulf Coast Naphtha use, versus none on the West Coast. The presence of petrochemical demand increases the value of the Gulf Coast Naphtha. Williams claims that it is impossible for Tallett's formula to take a partial Gulf Coast relationship for Naphtha and relate it to the value of Naphtha on the West Coast if that formula does not reflect the added demand for Naphtha on the Gulf Coast in the Gulf Coast Naphtha relationship and regression formula. This, Williams argues, is especially relevant since Tallett admitted on cross examination that the petrochemical market could have at least the same effect on the Gulf Coast Naphtha price as the jet fuel market does.[106]

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[105] Transcript 9060:3-8.

[106] *Citing* Transcript 6838:1-17.

92. Williams further contends that the ALJ erred by ignoring the relationship between intermediate feedstock prices on both coasts where those feed stocks are similar to Naphtha and support the use of the Gulf Coast Naphtha price to value West Coast Naphtha. Williams avers that the record evidence undeniably establishes that the Tallett regression formula attributes all but two tenths of one cent of the higher West Coast gasoline refiner's margin to Naphtha and results in over evaluation of West Coast Naphtha just under seven cents per gallon. When this is corrected, the West Coast Naphtha value is virtually the same as the Gulf Coast Naphtha value. When the Tallett regression formula is applied to VGO, it overvalues West Coast VGO by about 4.5 cents per gallon. Such over valuations are unjust and unreasonable and violate the *OXY* decision that all Quality Bank cuts be valued the same, or all have to be over-or undervalued to the same extent.

3. *Commission Determination*

93. We affirm the ALJ's finding that circumstances had changed materially since 1993 when the Commission determined that West Coast Naphtha should be valued on a Gulf Coast basis and that "there is substantial evidence that continuing to base the value of West Coast Naphtha on the basis of Platts Gulf Coast Naphtha assessment no longer is just and reasonable."[107]

94. We find that the material changes cited by the ALJ include: (1) the change in the Commission's policy regarding its refusal to consider adjusted proxy prices for (ANS) cuts; (2) the virtual end to ANS shipments to the Gulf Coast; (3) the parties' agree-

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[107] I.D. at P 2679; *see also* I.D. at P 2664.

ment to value West Coast VGO using the published OPIS West Coast High Sulfur VGO weekly price instead of a Gulf Coast price assessment; and (4) the impact of reformulated gasoline specifications on the West Coast market. We agree with the ALJ's finding that the record contains more than sufficient evidence to establish that the West Coast markets for gasoline and intermediate petroleum products differ greatly from those on the Gulf Coast and, therefore, there is no basis for a Gulf Coast Naphtha assessment that can be said to represent the value of West Coast Naphtha.

95. We find that continuing to value West Coast Naphtha on the basis of Gulf Coast prices would violate the D.C. Circuit's internal consistency requirement since West Coast Naphtha then would be the only West Coast valuation to be based upon the Gulf Coast market, a market that no longer receives substantial volumes of ANS crude.[108]

96. We find that the ALJ properly determined that continued use of the Gulf Coast Naphtha price to value the West Coast Naphtha cut was no longer just and reasonable, and therefore, the Commissions should replace the current West Coast Naphtha valuation, which uses a Gulf Coast price assessment, with a viable, appropriate West Coast methodology.

C. How Should the West Coast Naphtha Cut Be Valued?

1. The ALJ's Ruling That the West Coast Naphtha Contracts Were Not Probative Evidence

97. In attempting to support their position on how the West Coast Naphtha should be valued, certain parties introduced 350 contracts involving the pur-

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[108] *See OXY*, 64 F.3d at 693.

chase and sale of West Coast Naphtha. This number was reduced when duplicates were removed as well as contracts where the price was unclear, so that only 200 contracts over an eight year period remained. The issue before the ALJ was the probative value of these contracts in establishing the value of West Coast Naphtha cut.

98. The ALJ stated that no reporting service assesses Naphtha's West Coast value because the trade is not robust and not transparent.[109] What was presented were approximately 200 contracts spread over an eight year period—an average of fewer than 25 each year or no more than two per month.[110] The ALJ stated that "it strains credulity to suggest that these few contracts could represent anything, much less the value of the Naphtha which refiners supplied to themselves," and thus, at best, the contracts "provide isolated or anecdotal evidence respecting West Coast [N]aphtha transactions, particularly for the pre-1999 period."[111] The ALJ concluded that based on this evidence, and for the specific reasons stated above, the contracts did not reflect the value of West Coast Naphtha and were unusable for any purpose in this proceeding.[112]

2. *Exceptions*

99. CPAI, Alaska, and EMT except to the ALJ's ruling that the contracts are not of probative value. They argue the findings in the I.D. that the West Cost Naphtha contracts "are unusable for any purpose in this proceeding," is erroneous as a matter of

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[109] I.D. at P 2681.

[110] I.D. at P 2682 n.779.

[111] I.D. at P 2582.

[112] I.D. at P 2685.

fact. They contend that the West Coast Naphtha contracts represent the best evidence on the record as to what willing buyers paid sellers for Naphtha on the West Coast, and provide important support for the findings in the I.D. regarding how West Coast Naphtha should be valued.

100. CPAI requests that the Commission find that the Naphtha contracts provide corroboration of the ALJ's findings that a West Coast value of Naphtha should be adopted and that the Tallett methodology represents a reasonable proxy. CPAI submits that the contracts can be used as a benchmark to evaluate the various claims made in the hearing regarding the West Coast value of Naphtha, and they provide important support for the findings made in the I.D.

101. CPAI states that moreover, the application of Tallett's methodology (as well as O'Brien's proposed methodology) leads to West Coast Naphtha values that are in the same range as the West Coast Naphtha contract values presented in the contract analyses for the period 1994-2001.[113] CPAI claims that again, this corroborates the finding in the I.D. that Tallett's methodology appropriately values West Coast Naphtha.

102. CPAI states that in contrast to the ALJ's conclusion, two economists stated that the contracts are the "most direct evidence" for evaluating the value of West Coast Naphtha.[114]

103. CPAI states that this expert economic testimony, in the absence of any trained economist testifying that the contracts are not probative, would justify

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[113] *See* Exhibits PAI-155, SOA-28, EMT-562, and UNO-56.

[114] *See* Exhibits EMT-67 and SOA-1 at 18.

the Commission's relying on the contracts to support any findings regarding the value of West Coast Naphtha. CPAI further states that the ALJ's concerns regarding the limited amount of sales of Naphtha under those contracts as compared to the amount of Naphtha actually used on the West Coast do not justify simply ignoring the contracts.

104. CPAI concludes that the Commission should not be dissuaded from using the contract analyses simply because the witnesses disagreed on exactly which contracts should be included in the analysis, as the ALJ found.[115] CPAI submits that the fact that the four analyses reached similar results notwithstanding their use of different subsets of contracts actually supports the validity of those results.

105. Unocal/OXY argue that the ALJ erred by ruling that the West Coast contracts could not be relied upon to establish West Coast Naphtha value. They state that the various analyses of these contracts were cited by all parties to support their respective positions and that to the extent they can be used to support the Tallett method, they can be used with equal credibility to support the continued use of Gulf Coast pricing.

3. *Commission Determination*

106. We affirm the ALJ's ruling that the West Coast Naphtha contracts submitted are not probative of the value of West Coast Naphtha refined as it is actually produced and used.

107. The Commission uses arm-length transactions as market value indicators in the markets in which the transactions took place, while the contracts sub-

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[115] I.D. at P 2683.

mitted here are often between related parties.[116] Moreover, relative to the volume of Naphtha production and usage on the West Coast, the number of contracts submitted to the ALJ to establish the value of Naphtha was properly held too small to be considered representative of the entire amount.[117]

108. We find that the ALJ properly based his conclusions on several factors, including witness credibility, the small number of contracts identified and analyzed, disagreement on which contracts were representative, and the lack of a West Coast Naphtha market.[118] We agree with the ALJ's finding that, at best, the contracts "provide isolated or anecdotal evidence respecting West Coast [N]aphtha transactions, particularly for the pre-1999 period."[119]

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[116] The cases cited by Alaska do not alter this principal. Thus, in *Portland Gen. Elec., Co.*, 20 FERC ¶ 61,294 at 61,563 (1982), the Commission accepted as reasonable a charge that had been negotiated in an arms length negotiation by the parties involved; the case in no way involved extrapolation from that transaction to any other transaction. In *Welch v. Tenn. Valley Auth.*, 108 F.2d 95, 101 (6th Cir. 1939), the court allowed that "[s]ales at arms length of similar property are the best evidence of market value," but concluded that it was doubtful that the market value of farm land could readily be determined by recourse to any one measure of value except in rare instances. Finally, Estate of Paul Mitchell, T.C. Memo 2002-098, 2002 WL 531148 at 11 (U.S. Tax Ct. 2002), is consistent because unsold stock is functionally similar to sold stock whether it is listed or not.

[117] Petro Star states in its Brief Opposing Exceptions that contract volumes range from a low of 1260 barrels per day in 1998 to a high of 7190 barrels per day in 2000, compared to total West Coast Naphtha production of approximately 470,000 barrels per day. (WAP-203 at 5, 8.)

[118] I.D. at P 2682-85.

[119] I.D. at P 2685.

D. *What Methodology Should Be Used?*

1. *ALJ's Findings*

109. The parties agree that any party suggesting a new methodology must establish that its proposal is just and reasonable. In other words, consistent with the Circuit Court's rulings in *OXY, Exxon* and *Tesoro*, the new manner of valuing West Coast Naphtha must be shown to be consistent with the manner of valuing the remaining eight cuts.

110. Since we have affirmed the ALJ's finding that the current method for valuing West Coast Naphtha is unjust and unreasonable because of changed circumstances, the issue presented is what methodology should be used in determining the new valuation. The ALJ selected the Tallett methodology as the appropriate method for valuing West Coast Naphtha and that it should be implemented on a prospective basis.[120]

111. Tallett's methodology is based on a regression formula which establishes relationships between the Gulf Coast Naphtha value as a feedstock and the prices of end-products derived from it, namely gasoline and jet fuel.[121] He then uses those relationships and West Coast prices for those same end-products to calculate the value of West Coast Naphtha.[122] The ALJ found the new formula to be an objective approach which requires no judgment on the part of the calculator.[123] The Tallett formula for valuing West Coast Naphtha is:

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[120] I.D. at P 2731.

[121] I.D. at P 459-531 (2004).

[122] *Id.*

[123] I.D. at P 2713.

Calculated Naphtha price in $/bbl = 0.653 *gasoline price + 0.306*jet fuel price - 0.780, where gasoline price = Platt's Unleaded Regular (ULR) mid value waterborne, and jet fuel price = Platt's Jet fuel 54 waterborne.

2. *Exceptions Opposing Tallett's Methodology*

112.Petro Star and Unocal/OXY assert that the ALJ erred in concluding that the Tallett methodology should be used to value Naphtha.

113.Petro Star argues that the record evidence does not support Mr. Tallett's and the ALJ's assumption that the relationship among prices for gasoline, jet fuel, and Naphtha is the same on the West Coast as it is on the Gulf Coast. Petro Star claims that the relationship shows instead that: (1) Mr. Tallett's regression formula describes price relationships on the Gulf Coast, not on the West Coast; and (2) market conditions for gasoline are very different on the West Coast than they are on the Gulf Coast, and that similar differences, albeit of lesser magnitude, exist for jet fuel. With regard to the former, Petro Star argues that the formula is an hypothesis and does not describe empirical data and relate observed prices for Naphtha to observed prices for gasoline and jet fuel. As to gasoline, Petro Star argues that because of the stringent environmental standards in California, *e.g.*, CARB gasoline, and outside California, gasoline markets are unstable on the West Coast and, in California, even minor upsets can cause significant price upswings because of restricted refining capacity, inadequate logistics infrastructure, and commercial barriers. In contrast, Petro Star states that the larger refining base on the Gulf Coast is less volatile and supplies large export markets in the Midwest and Northeast. As to jet fuel, Petro Star argues that there is more

emphasis on jet fuel production on the West Coast because of the major airport hubs and the fuel requirements of trans-Pacific flights, and jet fuel on the West Coast is subject to the very different market forces that affect the Pacific Rim as compared to the Caribbean.

114. Unocal/OXY argue that absent evidence of what the West Coast value of Naphtha is, it was not possible for the ALJ to approve the Tallett methodology as just and reasonable. In addition, they argue that the Tallett methodology, based on a regression of Gulf Coast gasoline and jet fuel prices against Gulf Coast Naphtha prices, is similar to a proposed formula for Naphtha which the Commission has previously rejected.[124]

115. Also, Unocal/OXY argue that the record does not sustain the findings and conclusions that the Tallett methodology establishes the approximate value of West Coast Naphtha. Unocal/OXY argue that the Tallett methodology applies a non-uniform methodology to the Naphtha cut in violation of *OXY, and* relies on price relationships that do not apply on the West Coast.

116. Further, Unocal/OXY argue that the ALJ's finding that the Tallett method lacks subjectivity is wrong. They point out that professor Baumol testified that any application of the results of a regression involves subjectivity.[125] Unocal/OXY also argue that the I.D. wrongly concluded that there are no market structure differences between the Gulf Coast and the West Coast that affect the Naphtha margins on the

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[124] *Citing Trans Alaska Pipeline System*, 65 FERC ¶ 61,277 at 62,288, 62,289 (1993).

[125] *Citing* Transcript 5130.

two coasts. They state that, in fact, the ALJ cited Gulf Coast petrochemical demand and Naphtha quality as examples of the market differences.[126]

117. Unocal/OXY also argue that the I.D. wrongly concluded that the Tallett methodology was supported by the O'Brien analysis.[127] They argue that the I.D. recognized O'Brien's analysis to be "so rampant with subjective determinations that it cannot meet the objectivity standard set out by the Circuit Court in *Exxon*."[128] Also, they believe that O'Brien's model uses a gasoline blend that cannot be sold on the West Coast, and reflects costs that are grossly understated.[129]

118. If the valuation method does need to be changed, Petro Star and Unocal/OXY argue that the ALJ should have adopted the Dudley methodology. That methodology first determines the price differentials between the Gulf Coast and the West Coast for VGO and LSR. Second, it determines the relative contributions of VGO and LSR to the Alaska North Slope crude oil common stream. Third, it applies the volume-weighted LSR and VGO price differentials to the reported Gulf Coast Naphtha price to determine an imputed West Coast Naphtha price to be used by the Quality Bank.[130]

119. In the alternative, Petro Star and Unocal/OXY argue that the ALJ should have adopted a methodology adding a $4.00 per barrel processing cost adjustment to the Los Angeles price for ANS crude oil, or a

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[126] *Citing* I.D. at P 2676

[127] I.D. at P 2704, 2702.

[128] I.D. at P 2702.

[129] I.D. at P 2698, 2701.

[130] *See* Petro Star's Brief on Exceptions On Naphtha at 18.

methodology adding a transportation differential to Gulf Coast Naphtha prices.

120. Williams essentially argues that the Tallett methodology fails the ALJ's consistency test of valuing the West Coast Naphtha cut consistently with the manner of valuing the other cuts—because: (1) no other cut where there is a published intermediate product price uses anything other than an unadjusted published price; (2) no other cut, for which there is a published intermediate product price is valued using a regression formula; (3) no other cut where there is no published intermediate product prices uses a finished product price that cannot be produced entirely from the intermediate product being valued; and (4) no other cut for which there is a published intermediate product price or which uses an adjusted finished product price relies on an assumed relationship on one coast to calculate an assumed price on the other coast.

121. Williams also argues that the ALJ never provided the necessary analysis to reach the conclusion that the Tallett regression formula is just and reasonable, and the ALJ ignored conclusive evidence that the Tallett regression formula significantly overvalues West Coast Naphtha by attributing the higher West Coast gasoline and jet fuel margins to Naphtha. Williams claims that adopting the Tallett methodology to value West Coast Naphtha failed to take into consideration the major change in the West Coast market caused by the advent of CARB gasoline.

3. *Commission Determination*

122. We find that Unocal/OXY's, Petro Star's and Williams's exceptions opposing the Tallett methodol-

ogy are without merit.[131] They contend that since the West Coast Naphtha cut is the only Quality Bank cut which has no published West Coast price assessment, with the exception of the Resid cut, it is impossible to value the West Coast Naphtha cut by using a published West Coast price assessment in the same way that the other Quality Bank cuts are valued. We affirm the ALJ's rejection of Williams's argument that Tallett's regression uses Gulf Coast prices to value West Coast Naphtha because Tallett used Gulf Coast prices to find the relationship between the prices of gasoline, jet fuel, and Naphtha.[132] We find that the Tallett methodology is objective because it determines the value of West Coast Naphtha based squarely on "objective" published West Coast prices for regular unleaded gasoline and jet fuel.[133] The standard statistical formula in the Tallett methodology is portable, can run on any computer, and no judgment is required to calculate the formula and anyone running the same analysis will come up with the same result.

123. We find that Williams's evidence relating to margins involving gasoline and crude oil, indicate nothing about the relative value of Naphtha, and as a result, provide no factual basis for Williams's argument regarding refining margins.[134]

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[131] A number of parties filed exceptions in support of the other methodologies proposed to determine the value of the West Coast Naphtha cut, which methodologies the ALJ rejected. Since we affirm the ALJ's finding that the Tallett methodology should be used, we need not consider whether another methodology could also be used to determine that value.

[132] I.D. at P 2705.

[133] I.D. at P 2713.

[134] I.D. at P 2705, 2708.

124. We find that evidence shows that higher West Coast gasoline prices led directly to higher West Coast Naphtha values, and in view of the evidence that the Gulf Coast price of Naphtha is determined almost entirely by the prices of gasoline and jet fuel in the same market, the appropriate conclusion to be drawn from the fact that West Coast gasoline and jet fuel prices are substantially higher than Gulf Coast gasoline and jet fuel prices is that the value of Naphtha on the West Coast is also substantially higher than the price of Naphtha on the Gulf Coast. We also find that the evidence shows that the value of Naphtha on the Gulf Coast more closely tracks the price of Gulf Coast gasoline than the price of crude oil.[135] We also find that Tallett's regression formula properly reflects the major change in the West Coast market caused by the advent of CARB gasoline requirements.

125. We affirm the ALJ's finding that the evidence shows that CARB requirements make Naphtha more valuable because the CARB requirements have attributes such as reformate's very high octane and low Reid vapor pressure (RVP), along with attributes related to the removal of impurities such as zero olefin and sulfur content. We find that the evidence shows that prior to the introduction of CARB requirements, most California refiners had already installed the equipment required to remove benzene from the reformate that they make from Naphtha. We find that the additional costs that California refineries have to incur to produce CARB gasoline have resulted in significantly higher prices for CARB gasoline than for conventional gasoline.

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[135] I.D. at P 2710.

126. The additional costs must be incurred to process Naphtha into CARB on the West Coast, does not mean that Naphtha has lost value as compared to its value in producing conventional gasoline on the Gulf Coast. We find that Tallett's regression formula compensates for any potential impact that the introduction of CARB gasoline might have on Naphtha's West Coast value by using West Coast jet fuel prices as well as the West Coast prices for regular unleaded gasoline. We affirm the ALJ's finding that Tallett's regression analysis confirms that, as Naphtha's value as a gasoline and jet fuel feedstock is higher than its value as a petrochemical feedstock, the former use creates a ceiling on its use for the latter.[136]

127. We also affirm the ALJ's decision that the evidence shows that the Naphtha used on the Gulf Coast as a petrochemical feedstock is a different, lighter Naphtha than the heavier reformer-grade used on the West Coast.[137] Also, we reject Williams's arguments that petrochemical demand on the Gulf Coast undermines the application of Tallett's Gulf Coast regression formula for the West Coast since: (1) the evidence shows that over 98 percent of the variation in Gulf Coast prices for Naphtha can be explained by movements in the Gulf Coast price of gasoline and jet fuel; and (2) small variations between the Gulf Coast prices of Naphtha and gasoline are almost entirely explained by movements in the Gulf Coast price of jet fuel.

128. We reject the argument that Tallett's use of a Gulf Coast regression equation to value West Coast Naphtha is inappropriate because, when applied to a

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[136] I.D. at P 2715.

[137] *Id.*

different regression equation relating to VGO, another Quality Bank cut, the regression equation fails to predict West Coast VGO prices. We find that Tallett had performed a separate analysis of the VGO prices on both coasts to verify that OPIS West Coast VGO prices were as reliable as OPIS Gulf Coast VGO prices.[138]

E. *Recomputation by QBA of the Value of the Naphtha Cut*

1. *ALJ's Findings*

129. The ALJ stated that "I further hold that the QBA should have the discretion to re-compute the value of West Coast Naphtha whenever circumstances require, but not less than once each year.[139] TAPS Carriers and Unocal/OXY filed exceptions to the ALJ's ruling.

2. *Exceptions*

130. TAPS Carriers claim that it seems likely that the intent of this statement is that a new regression analysis will be run periodically to derive new constants for the valuation formula set forth by Tallett since the ALJ noted that "Tallett's regression analysis can be updated periodically...."[140] TAPS Carriers assert that it does not seem likely that the I.D. intended that the West Coast Naphtha value to be used in the monthly Quality Bank calculations would be updated perhaps as infrequently as once each year. TAPS Carriers submit that under the routine operation of both the current and projected Quality Bank methodologies, each component is valued monthly based upon current market data. TAPS Carriers

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[138] I.D. at P 1985.

[139] I.D. at P 2720, 2732.

[140] I.D. at P 2714.

further submit that thus it is the QBA's understanding that, under the formula proposed by Tallett, West Coast Naphtha would be valued each month for purposes of the Quality Bank using the current West Coast gasoline prices and West Coast jet fuel prices and the regression equation. TAPS Carriers request that the Commissions confirm that it is the constants in the regression equation rather than the West Coast Naphtha value that should be recomputed "whenever circumstances require, but not less than once each year."

131. Unocal/OXY argue, with Petro Star's support, that the ALJ's rule that the QBA should have the discretion to re-compute the value of West Coast Naphtha whenever the circumstances require is unprecedented, unwarranted and fraught with difficultly and uncertainty. Unocal/OXY complain that unfettered discretion on the QBA to make future changes to Naphtha valuation, notwithstanding what is resolved in this case, would violate the most basic principles that govern a Quality Bank.[141]

3. *Commission Determination*

132. It is apparent that what the ALJ was referring to was the QBA fulfilling his ministerial functions in rerunning the Tallett regression equation using new pricing data to re-compute the values of the constants in the West Coast Naphtha valuation formula. This would not require any subjective judgment on the part of the QBA. The only discretion that the QBA was given was how frequently such a re-computation of the formula should be performed.[142]

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[141] Williams filed Briefs on Exceptions raising the same arguments as Unocal/OXY concerning the QBA's revision rights.

[142] I.D. at P 2720, 2732.

133. Accordingly, we find merit in the ALJ's ruling that the QBA should have the ability to recompute the value of West Coast Naphtha, but clarify that the QBA can recompute the constants in the regression equation whenever circumstances require, but not less than once each year.

F. *What Is The Effective Date For Implementing The New Methodology?*

1. *ALJ's Findings*

134. The ALJ states that "The formula by Tallett should be implemented on a prospective basis. While there have been suggestions that it be implemented at an earlier date, substantial evidence does not support such a determination."[143] CPAI and EMT filed exceptions to the ALJ's I.D.

2. *Exceptions*

135. CPAI believes the ALJ failed to recognize that the Interstate Commerce Act (ICA), the Alaska Pipeline Act (APA) and prior rulings of the Commissions require that the new Naphtha valuation methodology be applied effective March 1, 2003 rather than prospectively.[144]

136. CPAI submits that the finding in the I.D. that "substantial evidence does not support" a determination that the Tallett methodology should be applied retroactively, is erroneous as a matter of law. CPAI argues that the Commission's orders in 2003 setting the Heavy Naphtha price for hearing made clear that any change to this price would be implemented as of

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[143] I.D. at P 2731.

[144] EMT filed Briefs on Exceptions raising the same arguments as CPAI in support of the March 1, 2003 retroactive effective date for the new West Coast Naphtha value.

March 1, 2003, a result that also is required by the relevant provisions of the ICA and the APA.

137.CPAI asserts that under the complaint provision of the ICA and APA that had been applied to assess Tesoro's argument that a West Coast Naphtha value should be adopted, the Commission was without power to give retroactive effect to any decision that use of the Gulf Coast Naphtha price no longer was just and reasonable.[145]

138.CPAI states that this changed, however, on February 27, 2003, when the TAPS Carriers made a filing that changed the reference price used in the Quality Bank to value Naphtha, both on the Gulf Coast and the West Coast, from the Platts Gulf Coast Naphtha price to the Platts Gulf Coast Heavy Naphtha price. CPAI argues that this new filing represented a change in the Quality Bank methodology, which CPAI and others protested as inappropriately applying a Gulf Coast price to derive a West Coast value. CPAI contends that as such, this filing is governed by section 15(7) of the ICA[146] which apply to changes in rates.

139.CPAI states that section 15(7) of the ICA provides that the Commission can, when a new rate such as the one at issue here is filed, set the rate for hearing subject to refund. CPAI asserts that the D.C. Circuit held in *OXY* that section 15(7) would authorize a retroactive application of a change in Quality Bank rates initiated by the TAPS Carriers.[147]

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[145] *See, e.g.*, *OXY*, 64 F.3d at 699.

[146] CPAI makes reference to the APA and rulings by the RCA. We will not consider those references as applicable to this proceeding.

[147] 64 F.3d at 698-99.

140. CPAI submits that the Commission's Order stated that:

> [T]he Commission will accept and suspend the tariffs, *to be effective March 1, 2003, subject to refund* and subject to the conditions set forth in the body of this order and in the ordering paragraphs below.[148]

141. CPAI asserts that after the Commission's orders on the change to the use of the Heavy Naphtha price filing, Judge Silverstein's investigation of the reasonableness of using a Gulf Coast Naphtha price to value West Coast Naphtha was conducted under section 15(7) of the ICA. CPAI claims that as a matter of law, when the ALJ found that it is not just and reasonable to value West Coast Naphtha based on a Gulf Coast price, that finding had to be made effective as of March 1, 2003.

142. CPAI claims that the effective date for the West Coast Naphtha value is not a factual issue that depends on substantial evidence, but rather a legal matter dictated by earlier Commission rulings and as a pure matter of law, the effective date must be set at March 1, 2003 for the reason that this is the date the TAPS Carriers changed the price that they used to value West Coast Naphtha from the Gulf Coast Naphtha price to the Gulf Coast Heavy Naphtha price. CPAI states that now that use of the Gulf Coast

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[148] *BP Pipelines (Alaska) Inc.*, 102 FERC ¶ 61,345 at P 13 (emphasis added). CPAI does not assert that the TAPS Carriers are obligated to make refunds from their own funds, since they redistribute to other shippers the Quality Bank payments that they receive. Rather, the TAPS Carriers should be obligated to recalculate Quality Bank payments and receipts and implement a retroactive redistribution of those payments and receipts, as provided in the RCA's Order No. P-89-1 (98).

Heavy Naphtha price has been rejected in favor of Tallett's methodology to value West Coast Naphtha, as a matter of law that ruling relates back to the moment when the new price was put into effect, subject to refund and that date is March 1, 2003.

143. CPAI asserts that in basing his ruling on substantial evidence, Judge Silverstein appears to have missed the argument that CPAI raised regarding its position that the effective date should be March 1, 2003. CPAI maintains that because a March 1, 2003 effective date is required as a matter of law, Judge Silverstein's holding, based on substantial evidence, should be reversed.

144. Unocal/OXY agree with the ALJ and state that if a change is warranted, the Commission can only make a change effective on a prospective basis.

3. *Commission Determination*

145. We affirm that the ALJ appropriately found that the newly adopted West Coast Naphtha valuation method should be implemented on a prospective basis only.

146. The West Coast Naphtha cut stands on a different footing than the Resid cut. That cut was challenged when the Commission accepted the distillate method, and then until the present proceeding there has not been an approved value for the Resid cut. This is not so for the Naphtha cut. In *Tesoro* the Court did not upset the validity of the West Coast Naphtha calculation but required the Commission to determine whether the existing valuation of the West Coast Naphtha cut was still just and reasonable.[149]

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[149] This issue is more fully addressed in our discussion of Issue No. 5, *infra*.

However, until there was a determination, the existing rate was the filed rate, and any change can only be made on a prospective basis.

147. The fact that under the existing valuation the Gulf Coast Naphtha was used to value the West Coast Naphtha does not make our determination here retroactive in the date of the change made in the Gulf Coast Naphtha valuation. The change in the Gulf Coast valuation was the result of the of the QBA decision that when Platts began publishing a new Waterborne Heavy Naphtha price assessment for the Gulf Coast in addition to the Full Range Gulf Coast Naphtha price then in use, he determined that the new Platts Heavy Naphtha assessment should be used in the Quality Bank Naphtha valuations and the TAPS Carriers filed tariff revisions to implement his decision. On March 28, 2003, the Commission accepted for filing the TAPS Carriers' filings to be effective on March 1, 2003, suspended their effectiveness, subject to refund and further Commission order.[150] The order also set the TAPS Carriers' filings for hearing and consolidated the dockets with the ongoing Quality Bank litigation.[151]

148. The QBA determined that the new assessment should be used to value both Gulf Coast and West Coast Naphtha. The QBA, however, recognized that the issue of whether to value West Coast Naphtha other than by reference to Platts' Gulf Coast assessment was before the Commissions.

149. That the Commissions adopted the new Gulf Coast assessment subject to refund and consolidated the proceedings does not mean that the Commissions

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[150] 102 FERC ¶ 61,345 at P 3.

[151] *Id.*

intended that the results of the pre-existing challenges to the use of the Gulf Coast reference price for valuing West Coast Naphtha would be implemented at the suspension date included in the Gulf Coast Naphtha order.

150. Moreover, the parties[152] have stipulated that Naphtha and VGO valuations on the West Coast should be effective on the same date and making the West Coast Naphtha valuation method retroactive to March 1, 2003, would deviate from the effective date for VGO, which the ALJ appropriately decided would be applied prospectively. Under the Joint Stipulation, the parties agreed that:

> If a different West Coast Naphtha valuation methodology is adopted in this proceeding, it and the new West Coast VGO value should have the same effective date.[153]

151. As discussed, *infra*, we affirm the ALJ's ruling that the new valuation of the VGO cut should be implemented prospectively. We find that the ALJ honored that agreement and found that both West Coast Naphtha and West Coast VGO should be implemented on a prospective basis.[154] We find no merit in the exceptions calling for implementation of the West Cast Naphtha valuation methodology on a retroactive basis to March 1, 2003.

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[152] The parties to the Joint Stipulation were: BP, CPAI, Petro Star, Williams, Unocal/OXY, EMT, and the State. Neither the TAPS Carriers nor Commission Staff joined in the stipulation. However, neither opposed the stipulation and the TAPS Carriers agreed not to contest it. *See* I.D. at P 25 n.10.

[153] *Id.*

[154] I.D. at P 2731, 2770. CPAI, a member of Eight Parties, supports the prospective implementation of the new West Coast VGO valuation method.

G. *The QBA's Replacement Proxies*

152. The QBA took two actions involving the Gulf Coast Naphtha valuation that became issues in this proceeding. The first involved the QBA's decision to use Platts Gulf Coast Heavy Naphtha assessment. The second involved the QBA's determination to average the price of two types of Naphtha shipments, one for barge shipments, and the second for ships.

1. *The Heavy Naphtha Issue*

a. *The ALJ's Ruling*

153. As for the change to the Platts Heavy Naphtha price, the ALJ found that "substantial evidence supports that TAPS Carriers' determination to replace the previously used Platts Gulf Coast Naphtha assessment with Platts Gulf Coast Heavy Naphtha assessment for all Quality Bank purposes, that such a substitution is just and reasonable, and that such determination should be implemented effective March 1, 2003."[155] Unocal/OXY filed exceptions opposing the heavy Naphtha reference price.

b. *Exceptions*

154. Unocal/OXY oppose the change to the "Heavy Naphtha" price quote because they believe that the old Naphtha quote was and is still available, no implementation problems were presented by the advent of the new Heavy Naphtha quote. They believe that the QBA exceeded his authority to change the rate under the circumstances that nothing had occurred to prevent or frustrate the continued use of the old price.

155. Unocal/OXY argue that instead of changing to the Heavy Naphtha price, the QBA should have continued use of the old price and thereby left any interested party, who preferred to use the new price, the

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[155] I.D. at P 2739.

option of initiating a change by filing a complaint with the Commission.

c. *Commission Ruling*

156. There was no record evidence to support Unocal /OXY's claim that Platts continued to publish the full-range Naphtha price assessment after February 2003 when Platts began publishing the Heavy Naphtha price assessment. We affirm the ALJ's ruling to accept the QBA's decision to use the Heavy Naphtha price as the proxy.

2. *The Averaging Issue*

a. *The ALJ's Ruling*

157. On May 1, 2003, Platts began publishing its Heavy Naphtha price assessments for the Gulf Coast into two separate price assessments: one for ship's cargo transactions involving quantities up to 250,000 barrels, and the other for barge transactions of less than 50,000 barrels. The QBA's proposed to use the arithmetic average of the two types of transactions. When certain parties protested, the Commission accepted the proposal, set it for hearing subject to refund, and consolidated with this proceeding.[156]

158. The ALJ found that substantial evidence supported finding that the QBA's action was consistent with the manner in which Quality Bank cuts are valued. Thus, the ALJ accepted the proposed action to be effective August 17, 2003, the date the Commission accepted the proposal and set it for hearing.[157]

b. *Exceptions*

159. Unocal/OXY and Petro Star argue that the QBA's averaging proposal is unnecessary and unwar-

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[156] 104 FERC ¶ 61,201 (2003).

[157] I.D. at P 9.

ranted in the pricing of the Naphtha cut since nothing had happened that would require the QBA to make a change of any kind, and the proposal would treat the Naphtha cut in a manner that is inconsistent with the treatment of other Quality Bank cuts, as averaging of posted prices for different quotes is not done for any of the other cuts.

160. Unocal/OXY also states that since the QBA relied on language in the tariff that allows him to make a change for a "radical alteration," he overstepped his authority by exceeding what Unocal/OXY considers as a test. Unocal/OXY contend that the test is if the previous Heavy Naphtha price is still published, there would be a "radical alteration" only if the values reflected in that price were changed so substantially that the price could no longer be used. Unocal/OXY further contend that there was only a one-cent difference between the cargo and barge assessments, and the remedy proposed by the QBA would reduce that difference to one half of a cent.

161. Unocal/OXY claim that if the Commission does not approve the proposal to average the barge and cargo quotes, then shippers that paid higher Quality Bank assessments as a result of the change that took effect on August 17, 2003, will be entitled to a refund for the increase amount they paid.

c. *Commission Determination*

162. Nowhere in the tariff is there any support for their argument that a change in a Quality Bank reference price must be shown to have some minimum magnitude or financial impact before the QBA can bring it to the attention of the Commission. In fact Unocal/OXY expressly state that the QBA's averaging proposal will have "a substantial impact" on the

parties involved in this case[158] Thus it is patently inconsistent for Unocal/OXY to assert that a change in the reference price is "not large" enough to permit the QBA to bring it to the attention of the Commission while at the same time arguing that it will have "a substantial economic impact" on the parties.

163. In addition there is no support to the assertion of BP and Unocal/OXY that there exists a "convention" that when there are two or more available reference prices for a particular Quality Bank cut, the Quality Bank has always chosen the reference price representing "the largest available quantities for valuing each cut."[159] Rather the only principle that has been applied is the selection of a reference price which most accurately reflects the *market value* of the particular cut, and that is the only standard that has been applied by the QBA.[160]

164. The evidence establishes that there are two reliable Platts price assessments for Heavy Naphtha, that both are supported by "numerous transactions," and that "[b]oth markets are therefore representative of the market for Heavy Naphtha on the Gulf Coast."[161] We agree that there is no factual basis in the record, therefore, for selecting one of those two price assessments over the other, and an appropriate just and rea-

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[158] Unocal/OXY Brief on Exceptions at 79.

[159] BP Brief on Exceptions at 62; Unocal/OXY Brief on Exceptions at 84.

[160] For example, in 1998, the QBA recommended adoption of the OPIS VGO barge assessment because that price assessment was "the most representative indicator of High sulfur VGO market value and therefore seems to be the best single price to reflect the market for High Sulfur VGO on the Gulf Coast." Exhibit TC-23 at 4 (emphasis added).

[161] Exhibit TC-22 at 4.

sonable solution is to simply average the two Heavy Naphtha price assessment, as the Quality Bank proposed.[162] Accordingly, we affirm the ALJ's ruling accepting the QBA's action to average the two prices effective August 1, 2003.

Issue No. 4 *Is the Current Method for Valuing the West Coast Vacuum Gas Oil Cut Just and Reasonable, and If Not, What is the Appropriate Method for Valuing the Vacuum Gas Oil Cut? What Should Be the Effective Date of Any Change to the West Coast Vacuum Gas Oil Cut?*

A. *The ALJ Rulings*

165. In May 1994 the Commission modified the reference price for valuing the VGO cut, which covers the 650}F to 1,000}F range: The Commission directed that the reference price for both the Gulf Coast and the West Coast would be OPIS Gulf Coast price for high sulfur VGO.[163] The Commission also rejected use of the West Coast price because of concern that the West Coast price was thinly traded, and was thus subject to manipulation. The reference price for VGO was not an issue in the *OXY* case.

166. In August 1998, Tesoro filed its complaint in Docket No. OR98-24-000 in which it objected to the existing VGO valuation and proposed that the West Coast VGO be valued using the OPIS West Coast VGO published price. This was the reference price that the Commission had rejected in the May 1994 Order. The Commission dismissed the complaint finding that Tesoro's proposal had been previously considered and rejected by the Commission, and that Tesoro had not shown any changed circumstances that

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[162] I.D. at P 2745.

[163] *Trans Alaska Pipeline System*, 67 FERC ¶ 61,175 (1994).

would require reconsideration of the issue by the Commission.[164]

167. In *Tesoro*, the Court held that the Commission should have addressed Tesoro's claim that the Commission's reason in the May 1994 Order for not using the West Coast VGO price was no longer valid.

168. At the hearing in this proceeding, the parties stipulated in the Joint Stipulation[165] that the West Coast VGO should be valued on the basis of the OPIS West Coast High Sulfur VGO weekly price, but disagreed as to the effective date. Eight Parties argued that the new price should be put into effect on a prospective basis. EMT argued that the effective date for the new price should be March 1, 2003. In support of its position, EMT referred to the stipulation which provided that there should be the same effective date for any new West Coast Naphtha value and the agreed-upon West Coast VGO value.

169. The ALJ held that there was no evidence in the record which supports making the agreed-upon West Coast VGO price effective on a retroactive basis. Accordingly, he held that the West Coast VGO would be valued using the OPIS West Coast High Sulfur

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[164] *Tesoro Alaska Petroleum Company v. Amerada Hess Pipeline Corp.*, 87 FERC ¶ 61,132 at 61,520 (1999).

[165] The stipulation provided:

> Stipulation to Issue No. 4 - West Coast VGO Valuation
>
> 1. West Coast VGO shall be valued based on the published OPIS West Coast High Sulfur VGO weekly price.
>
> 2. The Parties disagree as to the effective date of the new West Coast VGO value. However, the Parties agree that if a different West Coast Naphtha valuation methodology is adopted in this proceeding, it and the new West Coast VGO value should have the same effective date.

VGO weekly price on a prospective basis.[166] He added that since he had determined that the new West Coast Naphtha value also should be made effective on a prospective basis, his ruling coincided with the parties' October 3, 2002, Stipulation. EMT and Flint Hills filed exceptions to this ruling.

B. *Exceptions*

170. EMT claims the ALJ erred in not making the new valuation retroactive since the new valuation corrects the Commission's error in dismissing the Exxon and Tesoro complaints. EMT refers to both since the parties stipulated that any revised valuation for West Coast Naphtha and West Coast VGO should have the same effective date. In support of its position EMT relies on *Tennessee Valley Municipal Gas Ass'n v. FPC*,[167] which EMT asserts also involved the erroneous dismissal of a complaint by an agency where the agency subsequently reinstated the complaint and found merit in the complaint. In that case, EMT contends the Court held that when relief is granted upon a complaint erroneously dismissed the relief must put the parties in the same position they would have been in if the error had not occurred. Here, EMT claims there were 920 days between the Commission's erroneous dismissal of the Exxon and Tesoro complaints on April 30, 1999, and the reinstatement of the complaint by the Commission's December 7, 2001 hearing Order.

171. Flint Hills excepted to the effective date asserting that it should be October 3, 2002, when the parties stipulated what the value for the West Coast VGO should be.

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[166] I.D. at P 2770.

[167] 470 F.2d 446 (D.C. Cir. 1972) (*Tennessee Valley*).

C. *Commission Ruling*

172. We find no merit in the exceptions. In *Tesoro*, the Court required the Commission to address the issue raised by Tesoro that the reference price for the West Coast VGO cut should be the West Coast VGO price. The parties have now stipulated what that price should be. Nothing in that stipulation provided for any retroactive application of that price or that it should apply from the date of the stipulation. Rather, the stipulation provided that if a new West Coast Naphtha price was established, the effective date of both that price and the new West Coast VGO price should be the same, as it is under the ALJ's ruling.

173. EMT's reliance on *Tennessee Valley* is misplaced. There, the agency had dismissed a complaint on the grounds that there was a stale record, and thus no basis for going ahead on the merits. The agency then reversed itself, stating that it should not have dismissed the complaint but should have reopened the record, which it did, and directed the complaint to proceed to hearing. Subsequently, the agency issued an order finding merit in the complaint. The period in between the agency's dismissal of the complaint and its own reinstatement of the complaint was 112 days. In *Tennessee Valley* the Court held that there should be some limited retroactive relief for this period of 112 days.[168]

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[168] In *Tennessee Valley*, the rate that was challenged in the complaint was superseded by a new rate that went into effect on March 17, 1971, subject to refund. The merits order finding the challenged rate unjust and unreasonable and ordering a reduction was issued May 5, 1971. The 112 days of retroactive relief would put the effective date of the May 5, 1971 order back to January 3, 1971. The Court held that only the period prior to March 17, 1971 was subject to retroactive relief, because the

174.In this case, the Commission did not reverse itself, but rather the Court directed the Commission to consider the complaint. Since then there has been no merits order on this issue. The parties have stipulated on the appropriate price, but there has been no finding that the prior reference price was no longer just and reasonable. The relief approved in *Tennessee Valley* was described by that court in a later opinion as "permissible under certain circumstances" because it "cuts to the heart of the concerns and values which inform the 'filed rate doctrine'."[169] Here, the existing West Coast VGO reference price was approved by the Commission's May 1994 Order and was not an issue in *OXY*. Thus it is the lawful, just and reasonable rate until replaced by another rate. While the parties stipulated as to a new reference price, until the Commission issues an order adopting that price, the existing reference price continues as the lawful rate.

175.Accordingly, we affirm the ALJ's ruling that the new reference price for West Coast VGO will be applied on a prospective basis.

Issue No. 5 *Should the revised values for the cuts subject to the D.C. Circuit remand in OXY (Resid, Heavy Distillate and Light Distillate) be made retroactive to December 1, 1993?*

176. The I.D. concluded that the revised values should be made effective on a retroactive basis, and the retroactive period would be back to December 1993. After issuance of the I.D., however, and after the parties filed exceptions, Congress passed legislation lim-

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new superseding rate would apply for the period after that date, so there were 61 days of retroactive relief, from January 13, 1971, to March 17, 1971.

[169] *Northwest Pipeline Corp. v. FERC*, 863 F.2d 73, 78 (D.C. Cir. 1988).

iting the period of any retroactive refunds in a pending TAPS proceeding to February 1, 2000. Section 4412 (b)(1) of the Motor Carrier Safety Reauthorization Act of 2005, Pub.L. No. PL 109-59, 119 Stat. 1144, enacted August 10, 2005, provides that for TAPS proceedings commenced before the date of enactment of that act, the Commission "may not order retroactive changes in TAPS quality bank adjustments for any period before February 1, 2000." Since the new valuations of the remanded cuts other than the Resid cut have been in effect since February 1, 1998, pursuant to the 1997 settlement, *infra*, P 182, there would not be any retroactive refunds applicable to those cuts. There may be retroactive refunds as to the Resid cut, though not for any period before February 1, 2000.

177. Accordingly, the issue presented is whether the Commission should affirm the I.D.'s determination that the new values should be applied on a retroactive basis, given that the retroactive period will be limited to February 1, 2000. As we conclude that the new values should be applied retroactively, we direct the Quality Bank Administrators to re-calculate the adjustment from February 1, 2000, forward.[170] It must be recognized that Eight Parties' equitable, and other arguments, were addressed to the I.D.'s conclusion that refunds were to be paid back to December 1, 1993. Since that no longer is the period for the refunds, and those arguments must be considered in light of this change, those arguments no longer have the same validity that they might have had if the refund period was back to December 1, 1993. As of the Congressionally mandated adjustment limit of Febru-

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[170] As discussed above, the new valuation for the West Coast Naphtha and VGO cuts are to be implemented on a prospective basis, so there are no refunds as to those valuations.

ary 1, 2000, all parties were well aware that in 1999, in *Exxon*, the Court had again rejected the existing Resid cut valuation, and also rejected the Commission's ruling that any new quality bank values would be applied only prospectively. Thus, the vitality of the arguments against retroactive adjustments has essentially been undermined by the Congressional action limiting the retroactive refund period to February 1, 2000.

A. *Background*

178. In 1995, the Court in *OXY* upheld the Commission's 1993 decision to change from the gravity methodology to the distillation methodology. However, the Court remanded the valuation of the Light and Heavy Distillate, Fuel Oil and Resid cuts. Subsequently, in 1997, the Commission approved a contested settlement which established new proxies for each of the remanded cuts.[171]

179. In that order, the Commission concluded that the settlement should be implemented on a prospective basis, as had other TAPS' settlements, and set forth the equitable grounds for doing so. This was consistent with the Commission's 1993 Order which applied the new distillation methodology prospectively, which the Court affirmed in *OXY*. In 1999, the Court in *Exxon* affirmed the Commission's order, with the exception of the valuation for the Resid cut, which is determined in this proceeding, and the Commission's ruling on the effective date for the new valuations of the remanded cuts.

180. In *Exxon*, the Court agreed that the Commission does have a measure of discretion in determining whether a new rate should apply retroactively. How-

[171] 81 FERC ¶ 61,319 (1997).

ever, the Court concluded that the equitable factors on which the Commission based its decision[172] did not overcome the strong equitable presumption in favor of retroactivity which would make the parties whole. The Court found that the factors that the Commission had relied on had no bearing on the decision not to make whole the parties that were injured by the erroneous valuation of the remanded cuts. The Court noted that all parties were on notice that the Commission's 1993 Order was being challenged, so reliance on the values of the cuts established by that order was unwarranted. The Court's concern was that the settling parties might have chosen prospective application of the settlement "to divvy up a windfall at the expense of the contesting parties."[173] The "windfall" referred to would be the inappropriate valuation of the distillate and Resid cuts from the 1993 date the distillation method was adopted until the revised valuation of these cuts upon the remand was implemented. Given the strong presumption in favor of making injured parties whole and the incentive that this creates for the parties to litigate regarding past errors and for the agency to correct those errors, the Court concluded that "on the record before us" the Commission "abused its discretion when it failed, without ade-

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[172] The Court stated that the Commission had relied on the following factors: (1) that parties supported the Nine Party Settlement only if it were implemented prospectively; (2) that all prior TAPS cases resolved by settlements have been on a prospective basis; (3) that the changes adopted by the 1997 Order only modify limited aspects of the distillation methodology put in place in 1993; and (4) that the TAPS Quality Bank is *sui generis*. 182 F.3d at 49.

[173] *Id.* at 50. The Court thus held that making the settlement conditional upon its being prospective could not be a factor that the Commission could rely upon.

quate explanation to make the revaluation and concomitant Quality Bank adjustments retroactive to 1993, when the distillation method was adopted."[174] The Court remanded the issue of the effective date of the new valuation method for action consistent with the Court's opinion.

181. The Commission's 2001 Hearing Order permitted the parties to introduce evidence why it would be inequitable to require retroactive application of the revised valuations for the distillate and Resid cuts.

B. *The ALJ's Decision*

182. The question addressed in Issue No. 5 was what should be the effective date of the proxy values approved by the Court in *Exxon*, and what should be the effective date of the Resid proxy determined in this proceeding. In addition to the Resid cut, the Court had remanded valuation of the Heavy Distillate, Light Distillate and Fuel Oil or Light Resid Cut. The parties had agreed to revised valuations for the Light Distillate and Heavy Distillate effective February 1, 1998, pursuant to a 1997 settlement which was not challenged. The Fuel Oil cut was folded into the VGO cut, effective February 1, 1998, pursuant to the 1997 settlement. The Court, in *Exxon*, approved this with respect to the Fuel Oil cut, 192 F.3d at 45.[175] The ALJ stated that the parties had agreed that if the new Resid proxy "is made retroactive to December 1993, the Nine Party Settlement valuations of the other three Remanded Cuts [*i.e.*, those which were approved in *Exxon*] should be retroactive for the period between December 1993 and implementation of the Nine Party Settlement in 1998." Thus, the ALJ stated,

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[174] *Id.* at 50.

[175] I.D. at P 2937.

it was only necessary to analyze the situation regarding the Resid cut.[176] As to Resid, the ALJ stated that it was not disputed that since the Commission adopted the distillation methodology for calculating cut values for Quality Bank purposes in 1993, the court had not accepted the Commission's designated Resid valuations.

183. The ALJ concluded that "As there never has been a Resid proxy since the Commission implemented the distillation method on December 1, 1993, it follows that the value of the Resid proxy established by this order should be made effective on that date as well. However, Eight Parties strenuously argue in support of a prospective only implementation."[177]

184. The ALJ described Eight Parties "equitable" grounds for implementation only on a prospective basis, but found no merit in them. The grounds were:

(1) Exxon benefited from the manner in which Natural Gas Liquids were treated prior to 1993 while the gravity method was challenged, and would benefit again were the Resid proxy valuation be made effective on December 1, 1993;
(2) the affected refiners were not able to arrange their operations to mitigate the impact of the new valuations;
(3) allowing refunds is not in the public interest; and
(4) the evidence does not reflect that the new proxy values were "just and reasonable" for

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[176] I.D. at P 2939.

[177] I.D. at P 2941.

the whole period from December 1, 1993, forward.[178]

185. Further he stated Eight Parties had argued that making the new Resid valuation effective on December 1, 1993, would not put the parties in the same position in which they would have been had the Commission made a determination approved by the Court. Moreover, according to Eight Parties, Exxon failed to show that it would have received the monies it claims as refunds had the Commission previously made the determination which is made herein regarding the value of a Resid proxy.

186. The ALJ stated that Eight Parties made "a strong case, based on equitable considerations for holding that the values of the remand cuts should be made effective on a prospective basis only," nevertheless "since the adoption of the distillation method there never had been a just and reasonable Resid proxy until this proceeding, and the proxy which is determined herein for Resid is the only just and reasonable value for it since December 1, 1993, and it must be *made effective on that date notwithstanding any equitable consideration.*"[179] (emphasis supplied). To that conclusion the ALJ appended a footnote that stated "I am satisfied, based on a reading of the entire record, that the Resid value established in this I.D. is just and reasonable, and was just and reasonable throughout the period from December 1, 1993, forward."[180]

187. Eight Parties had argued that since during the period from 1989 to December 1993, when the gravity method was under challenge (the First Period), Exxon

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[178] I.D. at P 2942.

[179] I.D. at P 2945.

[180] I.D. at n.871.

received Quality Bank payments greater than the amount that it would have received if the distillation method had been in place but was not required to repay the excess amount when the Commission in 1993,found that the gravity method was no longer just and reasonable, Exxon should not also get all the benefit from implementing the new valuations back to 1993 (the Second Period) when the existing valuations under the Commission's order was also under challenge. The ALJ first held that the calculation of the financial benefit that Exxon, as well as others, received during the First Period was questionable. Next he found that the evidence did not show "that there is a clear delineation between them (as a group) and Exxon with regard to being benefited during the period when the Commission was considering replacing the gravity method."[181] Thus, some members of Eight Parties also benefited from the gravity method not being replaced until 1993, and some members of that group also benefit from the retroactive application of the Resid valuation to 1993.[182]

188.As to the argument that it was unfair to apply the new valuations to refinery operations back to 1993 because refiners have to operate their refineries based on the Quality Bank valuations in effect when refiners decide how to operate, the ALJ held that all parties were on notice that the Resid valuation was being challenged. Accordingly, the refiners could not rely on the challenged valuations, and he rejected the contention that the refiners would have operated their refineries differently to minimize their Quality Bank payments if they had known the Resid cut valuation

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[181] I.D. at P 2946.

[182] Eight Parties consist of both refiners (Williams Alaska and Petro Star), as well as producers.

ordered here would be in effect throughout the period. Thus, he stated, "while they might not have known exactly how Resid eventually would be valued, they were on notice that it probably would not be valued as the Commission first did in 1993 since, at least, the issuance of the *OXY* decision by the Circuit Court in 1995. Under these circumstances, the prudent businessman would have taken steps to protect his business."[183]

189. The ALJ held that cases cited by Eight Parties such as *Town of Concord, Norwood and Wellesley v. FERC*,[184] did not support their position that there should not be retroactive application of the new valuation back to 1993. In this case, he found, that on equitable grounds even though no party was at fault, "the equities lean in favor of granting refunds to those who overpaid into the Quality Bank."[185]

190. As to the public interest argument advanced by Eight Parties, he concluded "the public has no interest in this case which solely involves how a pool of money is to be divided amongst multi-billion dollar corporations."[186]

191. Accordingly, he directed that "the Quality Bank Administrator re-calculate the Quality Bank from December 1993 forward and make appropriate refunds (footnote omitted). However, as it is clear that the TAPS Carriers are not liable for payment of such refunds, in the event that collections, less costs, do not equal the refunds due, such refunds are to be

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[183] I.D. at P 2947.

[184] 955 F.2d 67 (D.C. Cir. 1992).

[185] I.D. at P 2949.

[186] I.D. at P 2950.

made on a *pro rata* basis."[187] The ALJ's Resid valuation will result in the Resid being worth less than it was under the prior valuation. This will increase the payments due to the producers of the light oil, such as Exxon, and will increase the payment obligations of the refiners and heavy oil producers.

C. *Eight Parties' Exceptions*

192. As noted above, the exceptions filed by the Eight Parties were based upon a retroactive date back to December 1993. Now that period will be limited to February 1, 2000. We have considered the arguments urged by the Eight Parties in light of this change.

193. In their exceptions Eight Parties argue that the ALJ erred in his basic premise that the new valuations of the remanded cut had to be applied retroactively to December 1, 1993. They contend that *Exxon* did not require that result, because the Court recognized the Commission's discretion when ordering refunds.

194. Eight Parties basic argument is that the equitable grounds urged by them here were not before the court in *Exxon*. Moreover, they contend that retroactive application of the remanded cuts would not put the parties in the positions they would have been in if the Commission had not erred, which is the basis for retroactivity.

195. Eight Parties' exceptions include two different approaches as to why the new Resid valuation should not be applied back to December 1993. The first basically involves the refund obligation of refiners, and the second is the "inter-period equities" argument.

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[187] *I.D.* at P 2952.

196. As to the first, Eight Parties argue that it is inequitable to apply the new value of the Resid cut to the refiners' operations back to 1993 because if refiners knew the value being assigned to the Resid cut at that time, they would have changed their product output to minimize their Quality Bank obligations. Only when the refiner knows what the Quality Bank cut valuations are, can it decide what is the optimal operation to minimize its Quality Bank obligations.

197. Eight Parties assert that evidence in the record established that refiners successfully optimized their refinery output to reduce the Quality Bank impacts. They cite to the testimony of witness Dayton that "refiners have always been successful in having their Quality Bank obligations less than what we projected." Transcript 12674: 14-23. Eight Parties argue that the refiners, who will be paying the majority of the refunds from the retroactive application of the new Resid valuation, have to operate their refineries based upon what the valuations are at the time they make their output decisions. Refiners could not have protected themselves from future changes by establishing reserves, as the ALJ seemingly suggested, because there was no benchmark which they could have used. Thus, the refiners were not in a position to protect themselves against the retroactive application of the new valuation. This, Eight Parties argue, differentiates this case from cases cited by the ALJ where a party would know the consequences if a challenged rate was later held to be illegal, and a different rate would be applicable retroactive to the time of challenge.

198. Eight Parties' position is that when it is impossible or difficult to return the parties to the position they would have been in absent agency error, neither

the Commission nor the court will require retroactive application, citing *Panhandle Eastern Pipeline Co. v. FERC.*[188] There, the Commission had authorized retroactive abandonment of a purchase contract by an interstate pipeline, as well as elimination of the payment obligations under the contract when the interstate pipeline seller accepted a blanket certificate because the Commission had committed legal error in originally rejecting the purchaser's abandonment application The Court remanded because the seller had been unable to sell its gas to others until the error was corrected and retroactively would not put the parties in the same position they would have been absent the legal error. Eight Parties contend that the ALJ recognized this in n. 880, but totally ignored this finding in his ruling to apply the new valuation back to 1993.[189]

199. Moreover, Eight Parties contend, the I.D. inappropriately established a Resid value on the West Coast outside the range of Resid values proposed by any of the litigants, including Exxon and Tesoro. In other words, Eight Parties assert, applying the ALJ's valuation of Resid retroactively results in a larger refund obligation than the refund obligation that would

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[188] 907 F.2d 185, 189 (D.C. Cir. 1990).

[189] Eight Parties refer to the following in n.880:

> Eight Parties also suggest that implementing the Resid value ordered here as of December 1, 1993, would not put the parties in the same position in which they would have been had the value been determined in 1993. Eight Parties Reply Brief at pp. 143-45. Inasmuch as about 15 years of litigation has passed since this matter first was initiated, and that, over that period, there have been multiple changes in the circumstances involving the ANS fields, the participants, and local, national and worldwide economic conditions, it is hard to argue with their claim.

result from adopting the proposed Resid valuation of any party to this proceeding, including Exxon.

200. Finally, Eight Parties assert, the ALJ failed to recognize that the parties here liable for the refunds differ from regulated entities where a rate is challenged. The parties here compete with others, and cannot provide in their contracts for additional payment if a subsequent decision is given retroactive effect and results in an increase in their costs. In contrast, if a regulated entity charges rates that are being challenged, the entity can hedge its risk from the consequences of a successful challenge by establishing a reserve equal to that part of the rate being challenged. If the rate in effect is reduced by a subsequent order, the entity can make refunds from the reserve it established and would be in the same position as if the new rate had been in effect the entire time. If the rate is upheld on appeal, the entity terminates the reserve and takes the full amount of the reserve into its revenues. In either event, the entity is in the same position as if the final decision on the rate had been in effect during the entire period. Here, Eight Parties assert, the refiners had no way of knowing what part of the valuations in effect was being challenged, and what reserves should be established in case of a reversal.

201. In sum, Eight Parties assert that in contrast to the usual rate proceeding when there is a pre-error status quo, here refiners and heavy oil producers could not estimate what the consequences of upsetting the Commission's 1993 Order would eventually lead to in terms of the valuation of the Resid cut. It is only with this order, assuming no further court reversal, that a Resid cut valuation has been established. In the interim there were numerous proposals for

valuing the Resid cut, some accepted, others rejected, none of which would value the Resid cut as low as the decision by the ALJ here.[190] For all these reasons, Eight Parties argue, the ALJ's decision to not grant some relief was erroneous.

202. The other equity argument advanced by Eight Parties involved the inter-period equities, which they contend the ALJ erroneously rejected. Regardless of the methodology, producers of the relatively heavier oil and the instate refiners would make payments into the Quality Bank. Producers of the relatively lighter oil would receive payments from the Quality Bank.

203. Although there were a number of different projections of what the refunds would be in each period, depending upon what cuts are included and the values assigned, the basic equity argument by Eight Parties is that producers of heavier petroleum who made payments into the Quality Bank when the gravity methodology governed, but were denied refunds for the First Period because the distillation method was applied prospectively in 1993, would owe refunds in the Second Period to producers of the lighter petroleum, who had received the overpayment from the Quality Bank in the First Period, and were not required to refund those overpayments. Specifically, Exxon, which would receive the bulk of refunds in the Second Period from the new Resid valuations, had also received overpayments in the First Period when

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[190] Exhibit WAP-253 tabulated the numerous proposals for the Resid valuation which included the following: the 1997 Nine Parties Settlement, the 1997 Tesoro proposal, the 2000 Eight Parties settlement, the 2000 EMT proposal, Eight Parties 2002-3 hearing proposal, the EMT, 2002-3, First Round Testimony proposal, and the EMT Reply Testimony proposal

the gravity method was in place, which overpayment it did not have to repay.[191] Eight Parties assert that the ALJ misunderstood the argument advanced by them based upon the balance of equities for the two periods. First, they cite to the ALJ's statement that "I find that the equities lean in favor of granting refunds to those who overpaid the Quality Bank."[192] Eight Parties argue that that was never the issue in this case because Exxon has never paid into the Quality Bank, but instead has always received payments from the Quality Bank. Rather, they argue, the issue here is whether parties who received more than they should have in Period I, because the gravity method rather than the distillate method controlled but did not have to repay the excess amount they received, should also receive more in the Second Period by applying the new valuation retroactive for the entire period, not whether anyone "overpaid," as the ALJ stated.

204. Eight Parties assert that the evidence showed that producers injured by the failure to give refunds for the unjust rates in the First Period, when the gravity methodology applied, would be injured a second time if refunds were required retroactive to 1993 in the Second Period, and that Exxon, which earned unfair windfalls in the First Period because the gravity meth-

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[191] Although Eight Parties' witness asserted "that shippers of lighter petroleum benefited greatly from the application of the gravity methodology during that time period, much more so than shippers of heavier petroleum have benefited by not having revisions in the distillation methodology made retroactive for the Second Period," Exhibit No. PAI 22 at 14-15, Exxon's calculation showed that it would be owed at least $40 million more in the Second Period that it would have owed in the First Period, and probably more than $55 million if all the cuts were considered. *See* Exhibit EMT-589.

[192] I.D. at P 2949.

odology overvalued its light oil, would benefit again in the Second Period if refunds were ordered on a retroactive basis.[193]

205. The ALJ reasoned, however, that the two periods were not legally comparable. During the First Period, he stated, a lawful, Commission-approved rate was in effect, even though it was later found to be unjust and unreasonable, while in the Second Period, "there has never been a lawful proxy price for the Resid cut."[194] Thus, no refunds could be awarded in the First Period, but must be for the Second Period.

206. Eight Parties argue that this begs the question. Equity, they contend, is relied upon to give relief when there is no adequate remedy at law. Finding a legal distinction between the two periods, therefore, does not disqualify the granting of equitable relief.

207. Eight Parties argue that the ALJ also wrongly relied on the supposed lack of a "clear delineation" between Eight Parties as a group and Exxon as to being benefited by the failure to apply the distillation methodology retroactively in 1993, whereas the new valuations are being applied retroactively for period 2 since 1993.[195] Eight Parties stated that there are two producers, Unocal and OXY who were harmed by the denial of retroactive relief in the First Period and who would also be harmed by the granting of it in the Second Period. At the same time, there was one producer, Exxon, who benefited from the denial of retroactive relief in the First Period, and who would also benefit from the granting of retroactive relief in the Second. Thus, they contend, regardless of the impact on other

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[193] Exhibit PAI-22 at 23.

[194] I.D. at P 2946.

[195] I.D. at P 2946.

parties, for purposes of illustrating the inequity of awarding refunds retroactively in the Second Period, when they were denied in the First Period, it is enough to show that Unocal and OXY would be doubly harmed by the inconsistent treatment, and that Exxon would be doubly benefited, even if such a double impact does not affect every party.

208. Eight Parties assert that the ALJ's conclusion that the Resid values determined by him are just and reasonable for the past is not based on reasoned decision making. First they argue that he cited no record evidence; in addition he did not consider whether the equipment he ordered to be used in the cost calculations was typically used in 1993 or 1994, or whether it was even available. Moreover, if the new Resid valuation is imposed retroactively, the valuations of Resid and other cuts will change according to different timetables, and only by the wildest coincidence will the Quality Bank accurately value all cuts retroactively as well as prospectively.

209. Eight Parties also assert that the ALJ erred because he denied that the public interest would be disserved by imposition of retroactive refunds. Basically Eight Parties contend that prospective implementation of Quality Bank methodologies facilitates efficient economic planning, while retroactive implementation frustrates efficient economic planning.

210. Finally, they assert that the ALJ erred indopting an all-or-nothing approach to the refund issue. They state that the ALJ found that no party was at fault in the delay in reaching the decision as to the valuation of Resid cut.[196] Despite this, Eight Parties state he failed to consider the circumstances, and con-

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[196] I.D. at P 2949, n.880.

cluded that refunds must be ordered retroactively "to put salve on the wounds of those who were injured."[197] Rather, Eight Parties contend, he should have considered alternatives, such as not requiring interest on any refunds.

211. In this connection Eight Parties argue that when retroactive application will not place the parties in the same position that they would have been absent agency error, as here, the Commission has the discretion to order an intermediate remedy. They argue that in an analogous case, *Panhandle Eastern Pipe Line Co. v. FERC*,[198] which involved a complex fact history that included numerous Commission orders, three appeals, and several attempted settlements spanning more than eleven years, full retroactivity was not required.

212. In *Panhandle*, the Court had reversed the Commission's approval of the pipeline's recovery of certain costs through direct billing of its customers. In the subsequent remand order, the Commission concluded that it would not require complete retroactivity because the Commission "cannot restore the parties to the position they would have occupied in the absence of the Commission's error."[199] The uncertainty was due to the fact that the pipeline could have acted in a different way to legally recover the amount from its customers if the Commission had not authorized the illegal method, and that the Commission had induced the pipeline to act in the way it did. Accordingly, the Commission decided to apportion the liability result-

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[197] I.D. at P 2947.

[198] 95 F.3d 62 (D.C. Cir. 1996) (*Panhandle*).

[199] *Panhandle Eastern Pipe Line Co.*, 70 FERC ¶ 61,167 at 61,521.

ing from its legal error by requiring the pipelines to refund the full principal amount of the costs they had illegally collected, but did not require the pipelines to pay interest on those amounts. The two amounts were almost the same, so the refund was half of what would have resulted from the full retroactive relief. The Court affirmed, stating:

> If the Commission could not reasonably determine what would make each party whole, and had no reason to impose a greater share of the burden of uncertainty upon one party than the other, then ordering a refund of principal without interest at a time when the principal and interest are of roughly equal value is a reasonable compromise.[200]

213. Eight Parties argue that the circumstances here are directly analogous to those in *Panhandle*. Thus, Eight Parties argue, the Commission could decide, as it did in *Panhandle*, that the balance of equities does not require the refiners and heavy oil producers to pay interest on the principal amount of any refunds ordered, or the Commission should order some alternative relief short of full retroactivity back to 1993.[201]

D. *Commission Ruling*

214. The issue now presented is not whether to require refunds back to December 1993 but back to February 1, 2000. We will, however, refer to Eight Parties' arguments that referred to the December 1, 1993 refund date.

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[200] 95 F.3d at 72.

[201] The TAPS Carriers request clarification whether the refunds ordered include interest from the effective date, and if it is, at what rate.

215. In *OXY*, the Court affirmed the Commission's decision to apply the distillation methodology prospectively. The court stated that the Commission relied on two grounds. The first ground was that the investigation ordered in 1989 was pursuant to section 13(2) of the ICA which does not provide for refunds. The second ground relied on was the filed rate doctrine. The Court agreed that the Quality Bank methodology has been "an integral element of the TAPS Carriers' tariff structure since [the Commission] approved the 1984 settlement."[202] Moreover, the Commission had properly relied on ICA section 13(2) that no refund could be ordered because the TAPS Carriers' 1989 annual filing did not propose a change in methodology. That filing would not be the type of notice that would put all parties on notice that there could be a future adjustment in the existing rate so the filed rate bar would not be applicable.

216. A different situation is present with respect to the refunds ordered here. In *Exxon*, as explained *supra*, the Court concluded that "on the record before us we hold that FERC abused its discretion when it failed without adequate explanation to make the revaluation and concomitant Quality Bank adjustment, retroactive to 1993, when the distillation method was adopted."[203]

217. Given the Court's ruling in *Exxon*, the question presented now is whether there is anything in the present record that was not present before that provides a basis for not applying the new valuations on a retroactive basis, but limited to February 1, 2000.

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[202] 94 F.3d at 699.

[203] 182 F.3d at 50.

218.Some of the exceptions urged by Eight Parties do not require much discussion. Thus, the public interest contention would hardly satisfy the court's test for not applying the ruling retrospectively. We agree with the ALJ that no public interest is at stake, but the issue is determining how a pool of money is to be divided among shippers, and does not involve the public at large. Eight Parties' argument that applying the new Resid value retroactively impairs economic efficiency is unconvincing. Similarly, Eight Parties' contention that there is no support for the ALJ's conclusion that the new Resid value is the just and reasonable valuation going back to 1993 disregards the purpose of the hearing, which was to establish the just and reasonable value for all the remanded cuts, including the Resid cut.[204]

219.Analyzing Eight Parties' remaining exceptions, we find they basically consist of two grounds, with varying ways of expressing them.

220.The first is that the "inter-period" equities suffice to not requiring applying the new valuation back to December 1993. Basically, Eight Parties argue that it would be inequitable to require the new valuations retroactive to 1993 because it would result in Exxon recovering refunds back to 1993, when that same party received more from the Quality Bank than it would have been entitled to had the gravity method not been in place from 1990 to 1993, but was not required to refund that excess amount it had received. Eight Parties seemingly are arguing that in determining when equitable relief should be

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[204] The ALJ in n. 871 stated " I am satisfied, based on a reading of the entire record, that the Resid value established in this Initial decision is just and reasonable throughout the period from December 1, 1993, forward."

awarded, the legal distinction between the two periods is irrelevant because "[e]quity is relied upon to give relief when there is no adequate remedy at law."[205]

221. Despite their attempts, it is inescapable that to accept this argument would basically be to ignore the ruling in *OXY* affirming the Commission's decision that no refunds can be awarded for the 1989-1993 period because the gravity method was the filed rate during that time. To say that if we accepted Eight Parties' contention that the Commission should not order refunds for the post-1993 period because the party receiving those refunds was not required to pay refunds in the pre-1993 period that no refunds are being awarded for that earlier period, but are merely being used to offset other refunds, does not respond to the Court's analysis in OXY, because the "filed rate" doctrine would be ignored for the pre-1993 period, and another rate would be applied for that period. Moreover, the other equity argument of Eight Parties' that it is unfair to award refunds for the post-1993 period when no refunds were awarded in the prior period was rejected by the court. In *Exxon* the court held that the Commission's reliance on the fact "that all prior TAPS cases resolved by settlements have been on a prospective basis" did not support its decision to apply the same approach to the 1997 settlement because this "equitable factor [] ha[s] no bearing on the decision and do[es] not explain [the FERC's] decision not to make whole parties who are clearly injured by undervaluation."[206]

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[205] Eight Parties Brief on Exceptions at 139-140.

[206] 182 F.3d at 48-49.

222. Even absent that bar to accepting Eight Parties' position, the ALJ set forth his reasons for rejecting it on the merits. Eight Parties assert that his rejection of their argument was in error in a number of ways but we find no merit in their contentions. First they assert that the ALJ "did not fully understand" their inter-period equities argument. However, the ALJ addressed Eight Parties' argument but found it "unconvincing" because the calculation of the "benefits" in the two periods were questionable, and that there was no clear delineation between Exxon, and the members of Eight Parties as to the benefits each would receive in the two periods.

223. Eight Parties claim that the ALJ wrongly relied on the lack of a "clear delineation" between those parties who were allegedly harmed by the absence of retroactive relief in Period 1, and those parties who will pay refunds if retroactive relief is granted for Period 2. The ALJ pointed out that Williams, one of Eight Parties, as well as Exxon greatly benefited under the gravity method. Moreover, he referred to the fact that while Exxon will benefit from applying the new valuation retroactively to December 1, 1993, so will at least Alaska, BP and Phillips, three members of Eight Parties.[207]

224. Eight Parties also take issue with the ALJ's finding that the calculation of the financial benefit during the First Period is "questionable." Eight Parties exceptions acknowledge that the calculation did not use consistent data for the two time periods, and their explanation that the two sets of data were used for different purposes does not respond to the question. Moreover, Eight Parties acknowledges that in

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[207] I.D. at P 2946.

preparing the First Period calculations many factors were simply assumed. Accordingly, we see no reason to reject the ALJ's conclusion that these calculations are questionable, and conclude, as he did, that the inter-period equities argument does not provide a basis for not applying the new valuations on a retroactive basis.

225. Eight Parties other equitable argument relates to the refiners' refund obligation. In essence Eight Parties argue that to apply the new Resid valuation retroactively to December 1993 would not put the parties in the same position they would have been in had the Commission not made the legal error of adopting the wrong proxy for the remanded cuts. Eight Parties assert that if the valuation of the remanded cuts had been different, the refiners would have operated their refineries differently to minimize their Quality Bank obligation, and, therefore, their refund should not be based on those valuations applied to their operations back to 1993.

226. However, as of the February 1, 2000 date, the Court had rejected the existing Resid valuation, so refiners should have taken this into consideration in their operations after the *Exxon* decision in 1999.

227. While Eight Parties cite to the ALJ's "supposed" recognition in n. 880 that retroactive application of the new valuation that would not put the parties back in the same position they would have been in had the new valuations been determined in 1993, they overlook the balance of the footnote which explained why refunds were necessary in spite of Eight Parties' argument. The balance of n. 880 stated:

> On the other hand, there may be parties injured by the Commission's failure to determine a Resid

> value which can be judged just and reasonable and there may be parties who benefited from those circumstances who should not have. Under these circumstances, the Commission has an obligation to do what it can to put salve on the wounds of those who were injured. It follows, therefore, that refunds, if warranted, must be paid to those who paid too much into the Quality Bank and that those who paid in too little must be billed for their underpayments.

228. Eight Parties take issue with the ALJ's conclusion in P 2947 that he found "unconvincing" the claim that "they might have operated their businesses differently had the Resid value ordered here been in effect throughout the period."

229. The ALJ's reasoning was:

> The Eight Parties were aware, from the beginning, that Exxon and Tesoro challenged the Commission's initial determination as to how Resid would be valued for Quality Bank purposes. While they might not have known exactly how Resid eventually would be valued, they were on notice that it probably would not be valued as the Commission first did in 1993 since, at least, the issuance of the OXY decision by the Circuit Court in 1995. Under these circumstances, the prudent businessman would have taken steps to protect his business. While the record does not reflect what they did, I assume that the affected members of the Eight Parties are operated by prudent businessmen.[208]

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[208] I.D. at P 2947 (footnotes omitted).

230. This reasoning paralleled the Court's reasoning in *Exxon* that the filed rate doctrine, which was applicable to why there were no refunds in the 1989-1993 period, did not apply to the refunds at issue here because that doctrine:

> Has no bearing on FERC's discretion to reallocate Quality Bank credit to correct FERC's erroneous valuation of the distillate and Resid cut because all the TAPS shippers were on notice as of 1993 that the valuations were contested.[209]

231. Eight Parties basically are arguing that the refiners were entitled to rely on the existing valuation notwithstanding that they were under legal challenge. Clearly the Court rejected this position in *Exxon*, as well as in *OXY*, where the Court stated:

> The rule against retroactive ratemaking, 'does not extend to cases in which [customers] are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.'[210]

Clearly, after 1999, refiners could not rely on the existing Resid valuation since the Court had rejected it in *Exxon*.

232. Eight Parties argue that the situation here is analogous to the situation in *Panhandle, supra*, where the Commission did not order a full retroactive refund. Rather, it apportioned the refund, and the Court affirmed because there, as here, absent the Commission error, the refunding parties could have acted in a

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[209] 192 F.3d at 49.

[210] 64 F.3d at 699 (quoting *Natural Gas Clearinghouse*, 965 F.2d 1066 at 1075 (1992)).

different manner which would have resulted in a smaller refund being due.

233. There are striking differences between the two situations. In *Panhandle*, the pipeline could have recovered the disputed amounts from customers legally, but in a different manner. Thus, in *Panhandle*, the Commission in denying the interest basically awarded half the full amount so there was an equal sharing of the relief. Here there is no way of knowing what the refiners' refund obligation would have been if they knew the Resid cut valuation from 1993 on. Thus, there is no basis for denying interest because to do so has no relation to what is appropriate relief in this case.

234. Moreover, Eight Parties' argument fails because even if it were true that had the refiners been aware of the valuation now assigned to the Resid cut they could have attempted to minimize their Quality Bank obligations, it does not follow that they would have been able to substantially reduce the amount of the refund that they will owe under aluation. What Eight Parties are arguing is that because the refund amount could have been a lesser figure, if the refiners had known the Resid valuation from 1993 on or from 2000 on, no refunds are due. We cannot accept that argument to eliminate the entire retroactive refund obligation. Thus, we affirm the ALJ's ruling that the Resid cut valuation must be applied on a retroactive basis.

235. Whether the period for the retroactive refunds should be less than back to December 1993 is in a different posture because Congress has limited the period back to February 1, 2000. We conclude that none of the equitable arguments advanced by Eight Parties justifies limiting the period of refunds beyond

that date. Accordingly, we will modify the I.D. by limiting the retroactive application of the new valuations as to the Resid cut to February 1, 2000, and the Quality Bank Administrator is to re-calculate the adjustment from February 1, 2000, forward.[211]

Issue No. 6[212] *Are Reparations an Issue in This Proceeding? If So, What Reparations, If Any, Are Appropriate?*

A. *Background*

236. The reparations issue relates solely to the valuation of the West Coast Naphtha and VGO cuts. The parties stipulated in an October 7, 2002 stipulation that the current method of valuating the West Coast VGO cut on the basis of the OPIS Gulf Coast spot price for high sulfur VGO should be changed to the OPIS West Coast spot price for high sulfur.[213] According to Exxon, the West Coast VGO price has been significantly higher than the OPIS Gulf Coast High Sulfur VGO price that has served as the Quality Bank proxy price for West Coast VGO since December 1993. Exxon, along with Alaska and Phillips, also contends that West Coast Naphtha prices over the past decade have differed substantially from Gulf Coast Naphtha prices and, indeed, generally have been significantly higher than Gulf Coast Naphtha

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[211] As discussed above, the new valuation for the West Coast Naphtha and VGO cuts are to be implemented on a prospective basis, so there are no refunds as to those valuations.

[212] Issue Nos. 6, 7, and 8 were not discussed by the ALJ. *See* n. 19 *supra*.

[213] EMT also contend that *Tennessee Valley*, *supra*, requires retroactive application of the revised Naphtha and VGO values to compensate Exxon Mobil for the financial loss it suffered arising from the erroneous dismissal of the Exxon and Tesoro complaints. We have explained in the discussion of Issue No. 4, *supra*, why *Tennessee Valley* is not applicable here,

prices. As a result, these parties maintain that the Quality Bank has substantially undervalued West Coast Naphtha. The claim for reparations would be the difference between the West Coast Naphtha and VGO values that have been in effect, and the values for those cuts ultimately determined to be lawful.[214] The reparations claim would include the two years before Exxon filed its June 19, 1996 complaint in Docket No. OR96-14-000, and extending to the date of this decision.

B. *The ALJ's Ruling*

237. In an earlier stipulation of December 14, 2001, Joint Exhibit 12, EM and Tesoro stipulated that the TAPS Carriers have not violated the ICA "except to the extent that implementation of the Quality Bank methodology that the [Commission] has directed the TAPS Carriers to implement constitutes such a violation." Further, paragraph 3 of that stipulation clarifies that reparations were not being sought from the TAPS Carriers' own funds.

238. The I.D. stated that according to Exxon, reparations is the term given to relief provided under section 16 of the ICA, in response to a complaint filed by a shipper under section 13(1) of the Act, for damages sustained for payment of existing rates that are ultimately found not to be just and reasonable.[215] Exxon's position was that the standard for the award of reparations is the difference between the unlawful rate and the lawful rate, and other evidence of loss by

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[214] Eight Parties asserted that Exxon's reparations claim for Naphtha totals some $64 million through 2002, offset by a negative $30 million (credit) for VGO reparations, for a net of some $34 million. I.D. at P 2954.

[215] I.D. at P 2972.

that shipper,[216] and the Commission has applied this standard in many cases.[217] Exxon relies on ICA section 16 which provides that reparations may be awarded up to two years prior to the date on which a complaint is filed, and through the period until the new rates are implemented.

239.The ALJ referred to Commission Staff's position that no claim was made by complainants that the TAPS Carriers violated their tariff. Rather, the claim is for refunds from other shippers who received more under the old reference prices than they would have received had the new reference prices applied. Staff asserted that there is no basis for an award of reparations because no damages were being sought from the TAPS Carriers, nor was there any showing of a violation of the TAPS tariffs. The claims against the other shippers who allegedly received more, Staff contended, should be considered in connection with Issues No. 3 and 4 concerning the effective dates for any changes in the valuation methodologies for the Naphtha and VGO cuts, and any refunds that may result from such changes. Those reference prices were not at issue in *OXY*, whereas in *OXY* the Court remanded the valuations of the Resid and distillate reference prices.

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[216] Exxon relies on I.C.C., 289 U.S. at 390; *Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 235 (1925); *Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. Alouette Peat Products*, 253 F.2d 449, 455 (9th Cir. 1957).

[217] Exxon cites to *Union Oil Co. of California v. Cook Inlet Pipe Line Co.*, 71 FERC ¶ 61,300 at 61,184 (1995); *see also Kerr-McGee Refining Corp. v. Williams Pipe Line Co.*, 63 FERC ¶ 61,349, at 63,224 (1993); *see also SFPP, L.P.*, 96 FERC ¶ 61,281, at 62,071 (2001).

240. The ALJ concluded that reparations were not an issue in the proceeding before him. The ALJ adopted Staff's analysis which rejected Exxon's argument that the complainants had sought reparations. Staff argued that while in its complaint Exxon contended that the TAPS Carriers had violated their tariffs, which would be a basis for reparations, subsequently Exxon entered into the stipulation which eliminated that claim against the TAPS Carriers. Staff also asserted that while there may have been a reference to reparations in past Commission TAPS orders that merely indicated that such a claim might be raised, but the stipulation Exxon subsequently entered removed that claim.

241. The ALJ held that "since Exxon has agreed that it is not seeking reparations from the TAPS Carriers, the Commission lacks jurisdiction to hear its complaint."[218] The ALJ added that even if reparations were an issue, he would not grant any because the reparations apply only to the new West Coast Naphtha reference price, and in this I.D. he had already ruled that that new reference price should be applied on a prospective basis.[219] Finally, the ALJ concluded that reparations could not apply to the new reference prices for West Coast Naphtha and West Coast VGO because these existing rates are the lawful rates, and under *Arizona Grocery*, only prospective changes could be ordered.[220]

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[218] I.D. at P 3075.

[219] As noted previously, the effective date of any new West Coast VGO reference price was stipulated to be the same as the effective date for the new West Coast Naphtha reference price.

[220] I.D. at P 3080-82.

C. *Exceptions*

242. EMT filed exceptions on the ALJ's ruling but only in a limited manner. They state that they do not take exception to his ruling that reparations could not be ordered under the Supreme Court's decision in *Arizona Grocery* because the existing method for valuing West Coast Naphtha and VGO had been approved by the Commission in its 1993 Order, and no party objected to that ruling at that time. Rather, they state that they except to his ruling that the Commission had no jurisdiction under the ICA to consider reparations because the complainants allegedly were "not seeking reparations from the TAPS Carriers."[221] EMT argue that since the legal issues may arise in future Quality Bank proceedings the Commission should vacate that portion of the ALJ's decision because it is clearly not correct.

243. EMT refers to the Commission's order setting Exxon's complaint for an investigation,[222] where the Commission specifically invoked section 13(1) of the ICA, which entitles a complainant to reparations against the carrier. Moreover, Exxon argues, in a subsequent order the Commission stated that, "If Exxon should prevail in its complaint case, then relief will be prospective from the date of the finding and *reparations are available to correct any inaccuracies that have occurred.*"[223]

D. *Commission Ruling*

244. There is no need to rule on this request that the Commission vacate a portion of the I.D. because

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[221] I.D. at P 3075.

[222] *Trans Alaska Pipeline System*, 76 FERC ¶ 61,119 at 61,621 (1996).

[223] *Trans Alaska Pipeline System*, 82 FERC ¶ 61,343 at 62,352 (emphasis supplied).

our function here is to pass on the ALJ's ruling that reparations could not be ordered and EMT do not take exception to that finding. However, even if we were to address the request we find no merit in it. Although they contend that the complaint did request reparations from the TAPS Carriers, it is clear that they are actually seeking refunds from the shippers who received excess payment under the old reference prices. This is manifest from the 2001 stipulation, Joint Exhibit 12, executed by EM and Tesoro after the cited Commission orders, which stated:

> ExxonMobil and Tesoro further agree (1) that they do not seek payment of any amounts by the TAPS Carriers except in the event, and only to the extent, that the TAPS Carriers recover such amounts from shippers that were overpaid pursuant to Quality Bank tariff provisions ultimately determined to be unjust and unreasonable, and (2) that they do not seek payment of any amounts by the TAPS Carriers from the TAPS Carriers' own funds.

245. The ALJ recognized what was at issue in this proceeding in the last footnote of the I.D. which stated:

> I feel compelled to note that, in essence, Exxon really is not seeking "reparations" which, in this case, would be damages awarded against the TAPS Carriers for violating their Tariff. As all parties have agreed that the TAPS Carriers did not violate the terms of their Tariff, that there are no damages sought from them, and that what is sought is an order requiring the Quality Bank Administrator to re-calculate the Quality Bank

> for a period of time, it is clear that what is sought is refunds, not reparations.[224]

Accordingly, we affirm that no reparations apply to the new West Coast Naphtha and VGO reference prices.

Miscellaneous Motions

1. *BP Motion to Require Interim Refunds*

246.On June 24, 2005, BP moved that the Commission modify the Heavy Distillate price that had been in place since February 2000, and to order interim refunds back to February 2000 based upon this new price. It requests that the price should be a value which more closely reflects the ongoing, current market value for the product, and should be the Platt's spot price quote for West Coast L.A. Pipeline low sulfur No. 2 Fuel Oil, as that price may vary from month to month, minus $0.0501/gallon to adjust for processing costs. This modified interim pricing methodology, is equivalent to the value that the ALJ found to be just and reasonable in the I.D.

247.P states the reason for the request is to minimize the further compounding of additional refunds—which are currently growing at a rate of approximately $9.6 million per month—until the Commissions issue an order permanently revising the Heavy Distillate valuation.

248. number of parties filed in opposition, and the TAPS Carriers sought clarification.

249.The motion is moot since in this order the Commission establishes the reference price for the Heavy Distillate cut, with retroactive refunds to February 1, 2000, *supra* P 77.

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[224] I.D. at P 3082 n.909.

2. *Williams's Motion to Strike*

250. Williams moved to strike footnote 124 of the Brief on Exceptions of EMT. This footnote noted that Williams had indicated in a news release issued two and a half weeks after the I.D. that, like Petro Star, Williams also "had established a reserve for the possibility of refunds resulting from this litigation." EMT opposed the motion.

251. Since this order does not refer to that footnote, the motion is moot.

The Commission orders:

(A) The Initial Decision is hereby affirmed in part and reversed in part, as discussed in the body of this order.

(B) Any motions or requests filed by the parties after issuance of the Initial Decision and not specifically referred to herein are hereby denied.

(C) TAPS Carriers are hereby directed to make a compliance filing with respect to matters directed in this order. The TAPS Carriers must make this filing within thirty days of this order, unless there is a request for rehearing, in which case the compliance filing must be made within thirty days of a final order by the Commission.

By the Commission.
(SEAL)

Magalie R. Salas
Secretary.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed On: May 20, 2008]

No. 06-1166
September Term 2007
FERC-OR89-2-016

PETRO STAR INC.,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

TESORO ALASKA COMPANY, *et al.*,
Intervenors

Consolidated with 06-1176, 06-1177, 06-1183, 06-1187, 06-1210, 06-1271, 06-1280

BEFORE: Sentelle, *Chief Judge*, and Ginsburg,* Henderson,* Randolph, Rogers, Tatel, Garland,* Brown, Griffith, and Kavanaugh, *Circuit Judges*

ORDER

Upon consideration of the petition of petitioner Williams Alaska Petroleum, Inc. for rehearing en banc,

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* Circuit Judges Ginsburg, Henderson, and Garland did not participate in this matter.

and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX F

STATUTORY PROVISIONS

SAFE, ACCOUNTABLE, FLEXIBLE, EFFICIENT TRANSPORTATION EQUITY ACT: A LEGACY FOR USERS, PUB. L. NO. 109-59, § 4412, 119 STAT. 1144, 1778-79 (2005)

SEC. 4412. QUALITY BANK ADJUSTMENTS.

(a) DEFINITION OF TAPS QUALITY BANK ADJUSTMENTS.— In this section, the term "TAPS quality bank adjustments" means monetary adjustments paid by or to a shipper of oil on the Trans Alaska Pipeline System through the operation of a quality bank to compensate for the value of the oil of the shipper that is commingled in the Pipeline.

(b) PROCEEDINGS.—

(1) IN GENERAL.— In a proceeding commenced before the date of enactment of this Act, the Federal Energy Regulatory Commission may not order retroactive changes in TAPS quality bank adjustments for any period before February 1, 2000.

(2) PROCEEDINGS COMMENCED AFTER THE DATE OF ENACTMENT.— In a proceeding commenced after the date of enactment of this Act, the Commission may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory

Commission imposing quality bank adjustments in the proceeding.

(c) DEADLINE FOR CLAIMS.—

(1) IN GENERAL.— A claim relating to a quality bank under this section shall be filed with the Federal Energy Regulatory Commission not later than 2 years after the date on which the claim arose.

(2) FINAL ORDER.— Not later than 15 months after the date on which a claim is filed under paragraph (1), the Federal Energy Regulatory Commission shall issue a final order with respect to the claim.

APPENDIX G

UNITED STATES SENATE
WASHINGTON, DC 20510-0203
(202) 224-6865
(202) 224-5501 FAX

August 22, 2005

Mr. R.W. Tillerson
President and Director
ExxonMobil Corporation
5959 Las Colinas Boulevard
Irving, Texas 75039-2298

Dear Mr. Tillerson:

I write in response to your August 9th letter regarding the inclusion of a provision in the highway reauthorization bill concerning the tariff methodology of the Trans Alaska Pipeline System Quality Bank. In general, I share your dislike for Congressional intervention in regulatory/legal disputes. In this particular case, however, the process appeared to be broken and was not capable of producing a fair and timely resolution of the conflict.

As you note in your letter, this case has been dragging on in the regulatory process and in court for 15 years with no end in sight. For the first 13 years of the dispute, the Alaska Congressional Delegation took no steps to speed a resolution of this impasse. In recent years, however, it has become evident that this impasse impacts more than just those parties immediately involved. The growth of international aviation and freight hubs in Anchorage and Fairbanks is dependent upon the

availability of reasonably priced aviation fuel, and the Congressionally-mandated implementation date for refineries to produce "ultra clean" diesel fuel is near. It was clear to the Alaska Delegation that something had to be done, if not to settle the case, then to at least give all parties some regulatory stability upon which future economic decisions could be based.

Earlier this year the Alaska Delegation encouraged FERC to speed up consideration of the existing case. In addition, as you are well aware, we introduced legislation to end all retroactive rate decisions unless a decision was reached in the pending case by December 31, 2005. We believe these actions made it very clear that we sought a timely resolution to this 15 year old dispute. In early May, Mr. Buford of your Washington office convinced my office to delay in pressing for a Congressional solution to give settlement talks more time to proceed. Then ExxonMobil submitted its June 16 settlement offer which, rather than appearing as a good faith effort to settle the case, seemed to most parties—not just the Alaska refineries—to be a hardening of settlement terms compared to statements made at mediator Wagner's Seattle talks this past spring.

Traditionally, all Quality Bank tariff methodology changes have been applied prospectively, which from 1977 until 1999 had been considered the "equitable approach" by all parties to Alaska oil disputes. As the Ninth Circuit noted in *Exxon USA v FERC* (1999), all previous Quality Bank rate cases had been applied "on a prospective basis" only. The change that was implemented through

the highway bill, however, allows retroactive claims to February 1, 2000. In addition, while Congress could have imposed a final resolution in this case, we deliberately chose not to, allowing FERC to review the findings of its Administrative Law Judge and give all parties a fair opportunity to appeal FERC's decision from that review.

Rather than Congress interfering, we attempted to balance competing interests for the benefit of all Alaskans and all U.S. citizens, just as we did in passage of recent national energy legislation that provided the oil and gas industry with an estimated $2.6 billion in tax breaks over the next five years at a time of record company profits to compensate for specific inequities in the existing tax code.

I am sorry that you do not find our efforts to reach a compromise on the Quality Bank satisfactory. I still encourage you to attempt to reach a speedy resolution to the Quality Bank case for the benefit of not just Alaskans, but also your shareholders.

Sincerely,

/s/ Lisa Murkowski
LISA MURKOWSKI
United States Senator

Supreme Court, U.S.
FILED
NOV 19 2008
OFFICE OF THE CLERK

No. 08-212

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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November 19, 2008

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QUESTION PRESENTED

Whether the Constitution permits Congress to enact legislation for an Article I tribunal that amends applicable law governing the relief available in a pending, non-final action.

RULE 29.6 STATEMENT

Respondent OXY USA Inc. ("OXY") is a wholly-owned indirect subsidiary of Occidental Petroleum Corporation, a publicly held corporation. Occidental Petroleum Corporation has no parent, nor is there any publicly held company that holds a 10% or larger interest in Occidental Petroleum Corporation.

Respondent Union Oil Company of California ("Union Oil") is a wholly-owned indirect subsidiary of Chevron Corporation, which is a publicly held corporation. Chevron Corporation has no parent, nor is there any publicly held company that holds a 10% or larger interest in Chevron Corporation.

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IN THE

Supreme Court of the United States

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EXXON MOBIL CORPORATION,
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FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Exxon Mobil Corporation ("Exxon Mobil") in its Petition for a Writ of Certiorari ("Petition") seeks review of an unpublished decision of the United States Court of Appeals for the D.C. Circuit, *Petro Star, Inc. v. FERC*, (Petition Appendix A), which dismissed numerous petitions for review of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Opinion No. 481.[1] In Opinion No. 481,

[1] *Trans Alaska Pipeline System*, Opinion No. 481, 113 FERC ¶ 61,062 (2005), *affirmed and modified in part*, Opinion No. 481-A, 114 FERC ¶ 61,323 (2006), *clarification granted and rehearing denied*, Opinion No. 481-B, 115 FERC ¶ 61,287 (2006).

the FERC resolved an extensive and complex dispute involving the Trans Alaska Pipeline System Quality Bank. The opinion was appealed to the D.C. Circuit by Exxon Mobil, Union Oil, OXY, BP Exploration (Alaska) Inc, Petro Star Inc., Williams Alaska Company, Flint Hills Resources Alaska, LLC, Tesoro Alaska Petroleum Company and the State of Alaska. Exxon Mobil is the only party to seek review of the D.C. Circuit decision.

Exxon Mobil claims that a statute passed by Congress while the Quality Bank case was pending before the FERC constituted legislative interference in the judicial process, violating the Constitution's separation of powers. The statute in question, Section 4412(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, limits refunds, in pending Quality Bank cases, to a period extending back to February 1, 2000, and in future cases to a 15-month period preceding the earliest, first order imposing Quality Bank adjustments in the proceeding. Exxon Mobil states that the statute deprived it of refunds for the period from December 1993, through February 1, 2000, amounting to $150 million. Petition at 5-6. According to Exxon Mobil, Section 4412(b)(1) prescribed a "rule of decision" for a pending case, which this Court declared to be unconstitutional in *United States v. Klein,* 80 U.S. (13 Wall.) 128 (1871). Exxon Mobil is supported by the Washington Legal Foundation ("WLF"), which filed an amicus brief.

Respondents Union Oil Company of California ("Union Oil") and OXY USA Inc. ("OXY") are or were producers of Alaska North Slope crude oil that is of relatively lower value under the Quality Bank

distillation method.[2] They both paid into the Quality Bank during the period in question, and would be subject to any retroactive adjustments ordered by FERC if Exxon Mobil were to obtain the relief it is requesting. Union Oil and OXY therefore have an economic interest in this matter and respectfully request that certiorari be denied.

STATEMENT OF THE CASE

The Statements of the Case set forth in Exxon Mobil's Petition and the *amicus curiae* brief filed by WLF merit comment on three points: the applicability of Section 4412(b)(1) to a single case; the interpretation of Section 4412(b)(2); and the refiners' underpayment of Quality Bank assessments.

First, Exxon Mobil states that Section 4412(b) of Public Law No. 109-59 "creates two rules relating to the Commission's power to order TAPS Quality Bank refunds. The first rule, subsection (b)(1), governs only this proceeding." Petition at 8. WLF echoes this claim. Referring to subsection (b)(1), WLF states:

> It declared that, with respect to the on-going TAPS proceedings and *no other proceedings*, FERC could not order Quality Bank adjustments for any period before February 1, 2000.

WLF Brief at 3 (emphasis in original). The second rule, subsection (b)(2), applies to proceedings commenced after the date of enactment (August 10, 2005).

The Exxon Mobil statement is correct but potentially misleading; the WLF statement mischaracter-

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[2] OXY divested its North Slope property in an exchange in December of 2000, but remained subject to the retroactive Quality Bank adjustments ordered by Opinion No. 481. Union Oil is still a producer.

izes Section 4412(b)(1). Subsection (b)(1) applies to "proceedings commenced before the date of enactment of this Act."[3] It is not by its terms limited to a single proceeding. It could, at least in theory, have included several proceedings within its scope. The Petition and the WLF Brief, without support from the legislative history, imply that the subsection was drafted *with the specific intent* that it be applied only to one case.

It is not inconceivable that other proceedings could have been encompassed within Section 4412(b)(1). Because the TAPS Carriers file new Quality Bank tariffs every year, and in light of the fact that such filings are subject to protests which take time to resolve, there were several potential proceedings that could have been included within the scope of Section 4412(b)(1).[4]

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[3] The complete text of Section 4412 is attached to the Petition as Appendix F.

[4] Quality Bank tariffs were protested in 2003 when the Naphtha cut valuation was changed, and in 2006 when Opinion No. 481 was implemented. Annual revisions of TAPS transportation rates, as distinguished from Quality Bank rates, have more frequently been protested. E.g., BP Pipelines (Alaska) Inc., Opinion No. 502, 123 FERC ¶61,287 (2008) (describing annual transportation rate filings and protests filed in 2005, 2006, and 2007); ARCO Transportation Alaska, Inc., 68 FERC ¶ 62,105 (1994)(protests leading to suspension of the 1994 transportation tariffs); Amerada Hess Pipeline Corp., 69 FERC ¶ 62,257 (1994) (protests leading to suspension of the TAPS Carriers' 1995 transportation tariffs); Amerada Hess Pipeline Corp., 73 FERC ¶ 61,401 (1995) (protests leading to suspension of the 1996 transportation tariffs); Amerada Hess Pipeline Corp., 77 FERC ¶ 61,343 (1996) (protests leading to suspension of the 1997 transportation tariffs); Phillips Alaska Pipeline Corp., 79 FERC ¶ 61,100 (1997); Amerada Hess Pipeline Corp., 81 FERC ¶ 61,413 (1997).

On February 27, 2003, the TAPS Carriers filed Quality Bank tariff changes affecting the value of the Naphtha cut to take effect on March 1, 2003. The proposed changes, assigned Docket Nos. IS03-137-000 through IS03-144-000, were protested by several parties, and on March 28, 2003, the Commission issued an order accepting the tariff changes, suspending them subject to refund, ordering hearings, and incorporating the issues raised into the hearings then underway in Docket No. OR89-2-000. *BP Pipelines (Alaska) Inc.*, 102 FERC ¶ 61,345 (2003). Had this proceeding not been consolidated with Docket No. OR89-2-000 (the proceeding that produced Opinion No. 481), then there would have been at least one additional Quality Bank proceeding that fell within the class defined by subsection (b)(1).

The TAPS Carriers filed annual Quality Bank tariff adjustments in January of 2003 (Docket Nos. IS03-90-000 through IS03-95-000), January of 2004 (Docket Nos. IS04-149-000 through IS04-153-000), and January of 2005 (Docket Nos. IS05-121-000 through IS05-125-000). (Appendix A hereto). Each of these filings took effect without formal action on FERC's part because none was protested. However, had any one or all of these filings been protested, then they most likely would have remained pending on the date that Section 4412(b) was enacted and would have been among the class of proceedings "commenced before the date of enactment" of Section 4412(b) and subject to the same restrictions on retrospective relief that were applied to Docket No. OR89-2-000.

Second, both Exxon Mobil and WLF assert that under Section 4412(b)(2), which is applicable to all Quality Bank proceedings commenced after the date

of enactment of Public Law No. 109-59, Exxon Mobil would have been entitled to refunds "with no limitation." Petition at 8. *See also* WLF Brief at 3. However, Section 4412(b)(2) has not yet been construed by either the FERC or a court. The interpretation espoused by Exxon Mobil and WLF, while not disputed by Union Oil or OXY, is only one possible interpretation of the statute. An interpretation of Section 4412(b)(2) that would limit refunds under that subsection even more stringently than the limitation under subsection (b)(1) has been espoused by Flint Hills Resources Alaska, LLC in a proceeding now pending before FERC.

Section 4412(b)(2) of Pub. L. No. 109-59 states:

> In a proceeding commenced after the date of enactment of this Act, the Commission may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding.

The critical words for interpreting the effect of this provision are "the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding." In *BP Pipelines (Alaska) Inc.*, FERC Docket No. OR06-10-000, Flint Hills Resources Alaska, LLC, has argued that the first order imposing Quality Bank adjustments does not occur until the compliance phase of a litigated proceeding, after the entry of the Commission's final order.

> In summary, given that quality bank adjustments at issue here must be fixed in numerical form by the compliance filing before they can be

> imposed, it follows that the first order imposing such adjustments, within the meaning of Section 4412, will not occur until Commission approval of the compliance filing. Consequently, the 15-month period under Section 4412 will not be calculable until the date of that future order approving the compliance filing, as that would be "the earliest date of the first order" imposing such adjustment in this proceeding.

Protest of Flint Hills Resources Alaska LLC to Compliance Filing of The TAPS Carriers, filed April 17, 2008. (Appendix B hereto). Exxon Mobil maintains here, as Union Oil has in Docket No. OR06-10-000, that the "first order imposing Quality Bank adjustments" is the order at the start of a proceeding that accepts proposed changes and implements ("imposes") them subject to potential modification and refund after hearings. Petition at 8. This interpretation of Section 4412 (b)(2) makes retroactive relief available to a date that precedes by over a year the filing by the Carriers of proposed Quality Bank changes. If this interpretation were applied to Docket No. OR89-2-000, it would indeed, as Exxon Mobil has argued, provide retrospective relief back to December of 1993. Petition at 14. But FERC has not yet issued an order in Docket No. OR06-10-000 to resolve the competing interpretations of Section 4412 (b)(2).

Third, it is somewhat misleading to state that the Alaskan refiners "were found to have dramatically underpaid the Quality Bank for the oil they removed from the common stream." Petition at 6. The Initial Decision made no finding respecting whether the refiners had underpaid the Quality Bank. The Initial Decision did, however, dramatically lower the value

of the Resid cut. Because the refiners return the Resid cut to TAPS, the Quality Bank methodology had allowed them a credit for the returned Resid. The Initial Decision's reducing the value of Resid indicated that the refiners had received too much credit over the time period that the distillation methodology had been in place.[5]

The distinction is important only because, as phrased by WLF, it would appear that the refiners had done something wrong because they had "significantly underpaid the Quality Bank." WLF Brief at 2. In fact, the refiners, and also Union Oil and OXY, paid into the Quality Bank the assessments established by the published TAPS tariffs. They legally could pay nothing more and nothing less. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-578 (1981).

REASONS FOR DENYING THE PETITION

The Petition does not raise an issue worthy of this Court's review. The Court of Appeals properly concluded that Section 4412(b)(1) was not unconstitutional and appropriately dismissed Exxon Mobil's appeal. Supreme Court review is unwarranted because Congress, by enacting Section 4412(b)(1), did nothing more than amend existing law governing the relief available from an Article I tribunal.

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[5] Union Oil and OXY produced oil shipped on TAPS that had relatively more of the Resid cut than the TAPS common stream. They paid into the Quality Bank during the period in question, but would be required to pay in more if the lower Resid value were applied retroactively as Exxon Mobil has requested.

I. THE DECISION BELOW IS CONSISTENT WITH PRECEDENTS OF THIS COURT

A. Section 4412(b)(1) Is Consistent with *Klein*.

Exxon Mobil and WLF argue that Section 4412(b)(1) runs afoul of the separation of powers principles proclaimed in *United States v. Klein,* 80 U.S. (13 Wall.) 128 (1871). According to Exxon Mobil, *Klein* held that Congress is forbidden from "passing laws that dictate the results in pending cases." Petition at 11-12. Exxon Mobil admits that subsequent decisions have recognized Congress' power to amend applicable law, and that Congress may intervene to change results in pending cases, but only by prescribing rules of general applicability rather than dictating the outcome of a single case. Petition at 13. Exxon Mobil and WLF insist that *Klein's* proscriptions apply, regardless of whether the case at issue arose in an Article III court or an Article I tribunal. Petition at 12; WLF Brief at 19-20.

Klein has very little in common with the present case. Unlike Section 4412(b), the statute in *Klein* directly infringed Article III of the Constitution. The statute in *Klein* circumscribed the Supreme Court's appellate review authority; it did not merely enact a standard for decision by a lower Article I tribunal. Furthermore, in *Klein*, the Court of Claims had rendered a final judgment, which was then pending on appeal to the Supreme Court when the statute was enacted. Here, by contrast, FERC had not yet issued its opinion, but rather had before it for review an initial decision of an Administrative Law Judge. Finally, in *Klein*, the statute at issue interfered with not only the Supreme Court's Article III jurisdiction, but also the Executive Branch's exclusive power under

Article II, Section 2, to grant pardons. In light of these critical differences, *Klein* easily is distinguishable.

Klein reviewed a statute enacted in 1870 that instructed the Supreme Court to rule a certain way in exercising its appellate review of a Court of Claims decision. During the Civil War, the federal government had come into possession of property abandoned by civilians in the rebellious states, including certain bales of cotton which had been sold and the proceeds deposited in the Treasury. A statute authorized the Court of Claims to return the property or its proceeds to the original owner if that owner could prove his loyalty. The heirs of the owner of the cotton filed such a claim, and presented a presidential pardon as proof of loyalty. The Court of Claims entered judgment in favor of the claimant, and an appeal to the Supreme Court was taken. Pending the appeal, Congress attached a proviso to an appropriation which required that, in any Court of Claims suit, a pardon introduced in evidence as proof of loyalty shall instead be considered proof of disloyalty. Congress provided that, if judgment has already been entered, the Supreme Court on appeal shall retain jurisdiction only for the purpose of determining whether a loyalty ruling was based on a pardon, and, upon determining that issue, shall thereafter dismiss the case.

The Supreme Court ruled that the 1870 statute was unconstitutional. It proclaimed that Congress had by statute prescribed "a rule for the decision" of a pending case, *id.* at 146. In so ruling, it is clear that the Court was primarily concerned with Congress' dictating directly to the Supreme Court how to decide a particular case:

> But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty.

Id. at 145. Respecting the effect of the statute, the Court stated:

> The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction. It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power. The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way?

Id. at 146. The Court went on to declare this a violation of the Constitution.

> We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power. It is of vital importance that these powers be kept distinct.

Id. at 147. The Court was equally succinct in stating that Congress had infringed upon the Executive Branch as well by revoking presidential pardons.

> The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive. It is the intention of the Constitution that each of the great coordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit.

Id. at 147.

In rejecting an argument by the government that Congress by statute had merely retracted the "favor" of allowing claims against the Executive Branch, the Court replied that Congress had undertaken to interfere with the Judicial Branch, and made clear its belief that the Court of Claims was at that time considered an Article III court. *Id.* at 144-145.[6] Regardless of whether the Court of Claims is an Article III or Article I court, however, it is clear that *Klein's* primary concern was that the 1870 statute

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[6] WLF incorrectly asserts that the Court of Claims' status was clearly understood in the 19th Century to be an Article I court. WLF Brief at 20. Its status was not clear. In *Ex Parte Bakelite Corporation*, 279 U.S. 438, 454-455 (1929), the Supreme Court stated that the Court of Claims is a legislative (Article I) court, and asserted that *Klein* recognized it as such. *See also, Williams v. United States*, 289 U.S. 553, 568 (1933) (affirming *Bakelite* and distinguishing *Klein* and other decisions to the extent they ruled otherwise). Congress in 1953 passed legislation declaring that the Court of Claims is an Article III court, and the Supreme Court in *Glidden v. Zdanok*, 370 U.S. 530, 585-589 (1962), accepted this declaration, distinguishing *Bakelite* and *Williams*. *See also, United States v. Sioux Nation of Indians*, 448 U.S. 371, 405 n. 25 (1980) ("at least since 1953, the Court of Claims has been an Art. III court").

directly infringed the Supreme Court's jurisdiction, thereby violating the separation of powers doctrine. *Id.* at 145-146.

Unlike the statute in *Klein*, Section 4412(b)(1) does not create a rule for decision by an Article III court. Instead, it provides a standard for relief available from an administrative agency which is not an Article III court but instead is an Article I or legislative court. Moreover, the statute does not reverse pardons, reopen judgments, or otherwise dictate a specific result. By merely limiting the type of relief available from the agency, it does not usurp the decision-making function of the FERC, or otherwise impose a "rule of decision" for a specific case. It merely amends applicable law.

Cases that have construed *Klein* indicate that Section 4412(b)(1) does not run afoul of the "rule of decision" holding in *Klein*. In *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995), the Supreme Court held on separation of powers grounds that Section 27A of the Securities Exchange Act, 15 U.S.C. §78aa-1, was unconstitutional. Section 27A was passed in 1991 to reverse the Supreme Court's *Lampf* opinion,[7] which had established a uniform, national statute of limitations for litigation under §10(b) and Rule 10b-5. Section 27A required courts to reopen final judgments decided on the basis of *Lampf* and to allow those cases to proceed if they met the state limitations law in effect before *Lampf*.

In holding that Section 27A was unconstitutional, the Court actually distinguished *Klein*: "Whatever the precise scope of *Klein*, however, later decisions

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[7] *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991).

have made clear that its prohibition does not take hold when Congress "amend[s] applicable law." *Plaut* at 218. The Court went on to explain that Section 27A amended applicable law, but it nevertheless "offends a postulate of Article III just as deeply rooted in our law." *Id.* The Constitution requires that Article III courts actually decide cases that come before them and that retroactively reopening final judgments violates this principle. The Court was careful to confine its holding to statutes that reopen final judgments, distinguishing situations in which Congress changes the law while cases are still pending, or while there is still a right of appeal to a higher court. *Id.* at 226-227. With respect to legislation that affected final judgments of non-Article III courts, the court ruled that "These cases distinguish themselves." *Id.* at 232. The Court acknowledged that Congress could avoid constitutional problems by including prospectivity and general applicability in its statutes, but stated that even a retroactive statute that "singles out" a small class or an individual may not necessarily be unconstitutional. *Id.* at 238-239.

The present case is a far cry from *Plaut*. Here, there was no final judgment when Congress amended the applicable law, and the FERC is not an Article III court. Furthermore, the mere fact that Section 4412(b)(1) applies to a small class, or even a single case, does not per force render the statute unconstitutional.

Congress' ability to amend applicable law is rather broad. In *Pope v. United States*, 323 U.S. 1 (1944), the Court of Claims rejected a claim by a government contractor for over-runs and excavation allowances under a tunneling contract with the government. After final judgment was entered, Congress passed a

special act requiring that the Court of Claims render judgment at contract rates for certain work under the Pope contract for which the government received the use and benefit. The work defined in the statute was the same work that the Court of Claims had rejected. The Court of Claims refused to apply the statute, holding that it violated *Klein*, but the Supreme Court reversed. It held that the special act did not require that the prior judgment be set aside, but rather created a new obligation, and that requiring the Court of Claims to enter judgment on this new obligation was not unconstitutional. *See also Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856) (statute overruling court decision declaring a bridge to be an obstruction of navigation held not to violate the Constitution's separation of powers).

In *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), the Court again refused to apply *Klein*. The statute at issue there addressed two district court decisions, which enjoined timber harvests that threatened the endangered spotted owl in thirteen federal forests in Oregon. In response to the two decisions, Congress enacted Section 318(b)(6)(A) of the 1990 Department of Interior and Related Agencies Appropriations Act, which stated that management of the forests in compliance with other provisions of Section 318 would satisfy the legal requirements that were the bases for the injunctions issued in the two cases. In rejecting arguments by the Audubon Society that the statute violated *Klein*, the Court ruled that Section 318(b)(6)(A) merely amended applicable law and did not direct a decision in a pending case. *Id.* at 441.

> We conclude that subsection 318(b)(6)(A) compelled changes in the law, not findings or results

> under old law. . .. Moreover, we find nothing in subsection 318(b)(6)(A) that purported to direct any particular findings of fact or applications of law, old or new, to fact.

Id. at 438.

Seattle Audubon explains why the *Plaut* Court qualified its reference to *Klein* with the phrase "whatever the precise scope of *Klein*." *Pope* and *Seattle Audubon* taken together have pared the "rule of decision" language in *Klein* very narrowly. In light of *Pope* and *Seattle Audubon*, it is clear that *Klein* does not apply to Section 4412(b)(1). Section 4412(b)(1) does not compel findings or results under old law, nor does it direct any particular findings of fact or applications of law to fact. It simply limits the extent of retroactive relief available in pending cases.

Any lingering doubt that *Klein* should not be narrowly construed was dispelled by *Miller v. French*, 530 U.S. 327 (2000). There the Supreme Court expressly distinguished *Klein* and upheld a statute that suspended injunctions issued by Article III courts, a legislative action far more intrusive on the judicial function than Section 4412(b)(1).[8] The Court held:

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[8] The statute at issue is described as follows: "The Prison Litigation Reform Act of 1995 (PLRA) establishes standards for the entry and termination of prospective relief in civil actions challenging prison conditions. §§ 801-810, 110 Stat. 1321-66 to 1321-77. If prospective relief under an existing injunction does not satisfy these standards, a defendant or intervenor is entitled to 'immediate termination' of that relief. 18 U.S.C. § 3626(b)(2) (1994 ed., Supp. IV). And under the PLRA's 'automatic stay' provision, a motion to terminate prospective relief 'shall operate as a stay' of that relief during the period beginning 30 days after the filing of the motion (extendable to up to 90 days for 'good cause') and ending when the court rules on the motion. §§ 3626(e)(2), (3)." 530 U.S.at 331.

> In contrast to due process, which principally serves to protect the personal rights of litigants to a full and fair hearing, separation of powers principles are primarily addressed to the structural concerns of protecting the role of the independent Judiciary within the constitutional design. In this action, we have no occasion to decide whether there could be a time constraint on judicial action that was so severe that it implicated these structural separation of powers concerns. The PLRA does not deprive courts of their adjudicatory role, but merely provides a new legal standard for relief and encourages courts to apply that standard promptly.

Id. at 350. Section 4412(b)(1) similarly provides a new legal standard for relief. It clearly does not violate *Klein*.

Nor does the decision below "eviscerate *Klein*," a claim Exxon Mobil supports with a citation to Justice Powell's concurring opinion in *Immigration and Naturalization Service v. Chada*, 462 U.S. 919, 966 (1983). Petition at 18. WLF similarly cites Justice Powell's concerns. WLF Brief at 12. *Chada* is completely inapposite. It held unconstitutional a statute that permitted a single chamber of Congress to override via legislative veto a determination made by the Executive Branch pursuant to delegated authority. The principle enforced in striking down the statute was the Constitution's requirements in Article I that the Legislative Branch act bicamerally with the participation of the President. *Id.* at 951, 957-958. In the instant case, Section 4412(b)(1) complied with all of the legislative restraints on abuse of legislative power built into Article I that were the focus of Justice Powell's remarks. Moreover, Justice Powell was

addressing a legislative veto of a decision by the Immigration and Naturalization Service to allow Mr. Chada permanent residency, an action with far more immediate and specific consequences than the legislative action at issue here.

Not only does section 4412(b)(1) not violate *Klein*, neither is the statute an unconstitutional bill of attainder, as Exxon Mobil seems to imply by its citation of *United States v. Brown*, 381 U.S. 437 (1965). Petition at 11, 13. "Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." *Id.* at 448-449 (quoting *United States v. Lovett*, 328 U.S. 303, 315-316 (1946). *Brown* held that Section 504 of the Labor-Management Reporting and Disclosure Act, which singled out union officials for punishment due to their membership in the Communist Party, was a constitutionally proscribed bill of attainder. Section 4412(b)(1) by contrast does not identify Exxon Mobil, or any class to which Exxon Mobil belongs, so as to inflict punishment on it without a trial.

B. Section 4412(b)(1) Amends Applicable Law on Refunds

Both Exxon Mobil and WLF admit that *Klein* does not prevent Congress from enacting rules of general applicability. Petition at 12-13; WLF Brief at 9, 11-12. However, they claim that, in Section 4412(b)(1), Congress did not merely amend existing law with a rule of general applicability. But contrary to Exxon Mobil and WLF's assertion, this *is* a case "where Congress amended the law governing the Commission's

refund power and the tribunal simply applied the new law to a matter pending before it." Petition at 14.

In adopting Section 4412(b), Congress provided two rules to govern retrospective relief, one that applies to all cases that were commenced prior to the effective date of the legislation, and a different rule that applies to all cases commenced after the effective date of the legislation. While the distinction between pending cases and future cases created two different classes, the rules for each class are stated in terms of general applicability. There is no clue on the face of the statute itself that only a single case is subject to the rule for pending cases.

Exxon Mobil argues the contrary, that Section 4412(b)(1) "does not amend applicable law; instead, it impermissibly directs results in a single pending adjudication under old law." Petition at 14. WLF picks up the refrain, arguing "there is no credible argument that when it prescribed a rule of decision in *this* case, Congress also changed the underlying generally applicable law." WLF Brief at 10. However, there *is* a credible argument that Congress prescribed a rule of general applicability when it enacted Section 4412(b)(1). Simply stating that the statute does not amend applicable law, but instead directs results in a single case, does not make it so.

The language of Section 4412(b)(1) is couched in terms of general applicability:

> In a proceeding commenced before the date of enactment of this Act, the Federal Energy Regulatory Commission may not order retroactive changes in TAPS quality bank adjustments for any period before February 1, 2000.

Nowhere does the statute identify or refer to Docket No. OR89-2-000, the proceeding that produced Opinion

No. 481. It does not "direct any particular findings of fact or applications of law, old or new, to fact." *Seattle Audubon* at 438. Under the standards recognized in *Seattle Audubon* and *Miller v. French,* the statute clearly amends applicable law.

Nowhere does the statute by its terms indicate that it is limited to a single case. By its terms, it applies to all Quality Bank cases that were pending in August, 2005, a class that in actuality included only one case—Docket No. OR89-2-000—but that also could have included other cases, had any of the annual filings in January 2003, 2004, or 2005 been protested, or had the March 2003 Naphtha change not already been consolidated with Docket OR89-2-000.

Even the fact that only one Quality Bank case was pending before FERC when the statute was enacted does not prove that the statute was not a rule of general applicability. The statute at issue in *Pope* applied to a single case, and yet the Supreme Court held that it did not violate the rule adopted in *Klein*. The same can be said for *Seattle Audubon*: a pair of cases was the subject of that statute, yet the Court still found that Congress had changed applicable law and not violated *Klein*. And, as admitted by the Petition at 16, and the WLF Brief at 15, Congress may always legislate regarding a legitimate class of one. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 472 (1977).

In fact, Exxon Mobil's complaint is similar to the complaint lodged by Former President Nixon: "In essence, he argues that *Brown* establishes that the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality."

433 U.S. at 469-470. The Supreme Court rejected this argument:

> His view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality. Furthermore, every person or group made subject to legislation which he or it finds burdensome may subjectively feel, and can complain, that he or it is being subjected to unwarranted punishment. However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals.

Id. at 470-471 (citations and footnotes omitted). Similarly, the argument here that Section 4412(b)(1) is unconstitutional because it impacts a single case and treats pending litigants differently than future litigants must be rejected.

II. THE D.C. CIRCUIT'S RULING DOES NOT CREATE A CONFLICT WITH OTHER CIRCUITS

In rejecting Exxon Mobil's constitutional challenge to Section 4412(b)(1), the D.C. Circuit relied principally on *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001). *See Petro Star, Inc. v. FERC*, Petition App. A. ("As to petitioners' separation of powers argument, any claim that Congress' decision here unconstitutionally exercised judicial power is foreclosed by our decision in *National*

Coalition to Save Our Mall v. Norton, 269 F.3d 1092 (D.C. Cir. 2001).") Exxon Mobil contends that the D.C. Circuit's reading of *Klein* in *Petro Star* and *National Coalition* conflicts with decisions of the Seventh, Ninth, Fourth, and Tenth Circuits. Petition at 19-20. However, the cases cited by Exxon Mobil all involved statutes that the courts *upheld*, and therefore there is no conflict between these cases and *National Coalition*.

In *National Coalition*, the D.C. Circuit refused to declare unconstitutional a statute that exempted from judicial review the decision undertaken by several agencies to construct the World War II Memorial on the Mall. The Coalition, like Exxon Mobil here, complained that the case-specific nature of the statute singling out one proceeding that was pending when Congress acted violated the "rule of decision" holding of *Klein*. After reviewing *Klein* and the Supreme Court decisions construing it, the Court rejected this challenge:

> In view of *Plaut*, *Miller v. French* and *Wheeling Bridge*, we see no reason why the specificity should suddenly become fatal merely because there happened to be a pending lawsuit.

269 F.3d at 1097.

Exxon Mobil claims that *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. 320 (1997), is inconsistent with *Petro Star* and *National Coalition*. It is not. In the first place, the issues in *Lindh* were very different. *Lindh* concerned a murder conviction appealed to the state's highest court, which Lindh challenged in an independent habeas corpus suit in federal court. The federal action was dismissed, Lindh appealed to the Seventh Circuit, and while the appeal was pending, Congress

passed a statute, 28 U.S.C. § 2254(d), governing the effect to be given in habeas proceedings to findings of fact in state courts. The Seventh Circuit applied the new law and denied Lindh's appeal. Hence, based on the holding of the case, it is entirely consistent with the action taken in *Petro Star*.

Secondly, in rejecting various constitutional challenges made by Lindh, what the Seventh Circuit said about *Klein* is not inconsistent with the result reached in the present case:

> Congress cannot say that a court must award Jones $35,000 for being run over by a postal truck, but it may prescribe maximum damages for categories of cases, or provide that victims of torts by federal employees cannot receive punitive damages.

Id. at 872 (citations omitted). In Section 4412(b)(1), Congress did not say that Exxon Mobil cannot be awarded an additional $150 million in refunds. Instead, as the Seventh Circuit indicated it can, Congress established a maximum amount of refunds, limiting them to a five-and-one-half-year retrospective period (February 1, 2000 through October 31, 2005).

Crater v. Galaxa, 491 F.3d 1119 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2961 (2008), which Exxon Mobil cites as an example of a conflict with the D.C. Circuit, also involved a state court criminal conviction and the same statute modifying habeas corpus relief in a collateral federal proceeding. In rejecting the claim that 28 U.S.C. § 2254(d) violates *Klein*, the Ninth Circuit held:

> Section 2254(d)(1) does not instruct courts to discern or to deny a constitutional violation. In-

> stead, it simply sets additional standards for granting relief in cases where a petitioner has already received an adjudication of his federal claims by another court of competent jurisdiction. The Constitution does not forbid Congress from establishing such standards, as the Fourth Circuit has eloquently explained.

Id. at 1127.

The Fourth Circuit opinion referred to by the Seventh Circuit, *Green v. French*, 143 F.3d 865 (4th Cir. 1998), *abrogated on other grounds by Williams v. Taylor*, 529 U.S. 362 (2000), is also cited by Exxon Mobil as a decision that conflicts with *National Coalition*. *Green v. French* rejected the argument that 28 U.S.C. 2254(d) violates the constitutional separation of powers doctrine, stating:

> In amending section 2254(d)(1), Congress has simply adopted a choice of law rule that prospectively governs classes of habeas cases; it has not subjected final judgments to revision, nor has it dictated the judiciary's interpretation of governing law and mandated a particular result in any pending case. And amended section 2254(d) does not limit any inferior federal court's independent interpretive authority to determine the meaning of federal law in any Article III case or controversy.

Id. at 874-875.

The final case cited by Exxon Mobil as being in conflict with *National Coalition* is also not in conflict. *Shawnee Tribe v. United States*, 423 F.3d 1204 (10th Cir. 2005), rejected a constitutional challenge to Pub. L. No. 108-375, § 2841, a statute that rendered moot a pending lawsuit seeking a transfer of federal prop-

erty to the tribe. The court stated: "Although *Klein* might be read broadly, it has been significantly limited by subsequent Supreme Court decisions." *Id.* at 1217 (citing *Plaut* and *Seattle Audubon*). In applying these decisions to the case before it, the court held:

> In this case, § 2841 simply provides a supervening way to dispose of the particular Sunflower Property. As long as the Secretary of the Army exercises that authority to dispose of the property, we hold that any claim under § 523 is moot. However, § 2841 itself purports neither to compel a particular decision in the case before us nor to decide how the law applies to our specific facts. That function is left to us as a court. Therefore, we conclude that § 2841 is a constitutional exercise of Congress's power to amend existing law and make it applicable to the property which is the subject of this pending case.

Id. at 1218.

Exxon Mobil seems to concede that these decisions may not be in conflict with *National Coalition*, Petition at 22, but requests certiorari nevertheless to quell what Exxon Mobil terms "a raging dispute" over the meaning of *Klein*. In addition to several periodicals, Exxon Mobil cites a Supreme Court case in which *Klein* is mentioned in a passing reference but is not part of the Court's holding. *Guiterrez de Martinez v. Lamagno*, 515 U.S. 417, 430 (1995). The debate over *Klein* appears to focus on whether, in light of *Seattle Audubon*, *Klein* has any vitality beyond its specific facts.[9] Whatever the merits of this

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[9] Notwithstanding the academic interest in Klein, the commentators do not appear to suggest an interpretation that would make Klein applicable to the facts of this case. *See, e.g.*, L.G.

dispute, the present case does not present a clear conflict among the circuits with respect to the proper interpretation of *Klein*. To the contrary, in the examples cited by Exxon Mobil, *Klein* has been applied in a consistent manner, not only in the case at bar but in the decisions of other circuits.

CONCLUSION

Union Oil Company of California and OXY U.S.A. Inc. respectfully request that the Court deny the petition for a writ of certiorari. The D.C. Circuit's decision in *Petro Star v. FERC* is consistent with precedent of this Court and it does not conflict with the law applied in other circuits.

Respectfully submitted,

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* Counsel of Record

November 19, 2008

Sager, *Klein's First Principle: A Proposed Solution*, 86 Geo. L. J. 2525, 2579 (1998) ("This is how we should understand the first principle of U.S. v. Klein: The judiciary will not allow itself to be made to speak and act against its own best judgment on matters within its competence which have great consequences for our political community.")

APPENDIX

APPENDIX A

Quality Bank Tariff
Filing January 2003, FERC Docket Nos.
IS03 90-000 through IS90-95-000

[Logo]

January 24, 2003

OIL PIPELINE FILING
SPECIAL PERMISSION REQUESTED,

Magalie Salas, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: Amerada Hess Pipeline Corporation Supplement No. 3 to F.E.R.C. No. 52; BP Pipelines (Alaska) Inc. Supplement No. 3 to F.E.R.C. No. 23; ExxonMobil Pipeline Company Supplement No. 3 to F.E.R.C. No. 69 Phillips Transportation Alaska, Inc. Supplement No. 3 to F.E.R.C. No. 4 Unocal Pipeline Company Supplement No. 3 to F.E.R.C. No. 206; Williams Alaska Pipeline Company, L.L.C. Supplement No. 3 to F.E.R.C. No. 4

Dear Ms. Salas:

Enclosed for filing are three copies of each of the following identical tariffs:

Amerada Hess Pipeline Corporation Supplement No. 3 to F.E.R.C. No. 52; BP Pipelines (Alaska) Inc. Supplement No. 3 to F.E.R.C. No. 23; ExxonMobil Pipeline Company Supplement No. 3 to F.E.R.C. No. 69 Phillips Transportation

Alaska, Inc. Supplement No. 3 to F.E.R.C. No. 4 Unocal Pipeline Company Supplement No. 3 to F.E.R.C. No. 206; Williams Alaska Pipeline Company, L.L.C. Supplement No. 3 to F.E.R.C. No. 4

The companies issuing these tariffs are collectively referred to herein as the TAPS Carriers.

On December 17, 1997 the Federal Energy Regulatory Commission issued Order Approving Contested Settlement in Docket Nos. OR89-2-007, *et al. Trans Alaska Pipeline System,* 81 F.E.R.C. ¶ 61,319 (1997). On January 13, 1998 the Alaska Public Utilities Commission ("APUC") issued its Order Adopting Federal Energy Regulatory Commission Order Approving Contested Settlement in Docket Nos. P-89-1, *et al. In re Formal Complaint of Tesoro Alaska Petroleum Co.,* Order P-89-1(87) (1998). One of the terms of the settlement approved by the Commission and the APUC is embodied in Item III.G.4. of the tariffs to which the enclosed tariffs are supplements. It requires that the adjustments to the reference prices for Light Distillate, Heavy Distillate and Resid in Attachment 2 to the tariffs be revised each year in accordance with a specified formula.

The enclosed tariffs are filed in compliance with the orders of this Commission and the APUC and Item 111.G.4. of the tariffs. Attachment 2C reflects revised adjustments to the reference prices for the Light Distillate, Gulf Coast Heavy Distillate and Resid components for the year 2002 calculated in accordance with the method prescribed in Item III.G.4. A table showing the calculation is attached as Exhibit A.

In accordance with orders of this Commission and the APUC's successor, the Regulatory Commission of Alaska ("RCA") and Item III.G.5. of the tariffs, the reference price of West Coast Heavy Distillate has not been revised. Pending a final decision by the Commission and the RCA on the appropriate processing cost adjustment to the replacement product price, the Quality Bank continues to use the October 1999 adjusted reference price for West Coast Heavy Distillate. *See Trans Alaska Pipeline System,* 90 F.E.R.C. ¶ 61,123 (2000); *In re Filing of a Notice by the Trans Alaska Pipeline System Quality Bank Administrator,* P-99-12(2) (2000).

Pursuant to Section 6(3) of the Interstate Commerce Act and 18 C.F.R. § 341.14, the TAPS Carriers request special permission for the enclosed tariffs to be effective on February 1, 2003, which is seven days' notice. As noted above, these tariffs are filed to comply with the orders of this Commission and the APUC and Item III.G.4. of the presently effective Quality Bank Methodology tariffs. Moreover, the data necessary to calculate the revised adjustments (from the January *Oil & Gas Journal*) is not available in time to make the required tariff filing more than 30 days prior to February 1, 2003. Because the Quality Bank adjustments are calculated on a monthly basis, it is important that the tariff revisions become effective on February 1, 2003.

Pursuant to 18 C.F.R. § 343.3 of the Commission's regulations, each of the TAPS Carriers other than Williams Alaska Pipeline Company, L.L.C. hereby requests that any protest to its enclosed filing be telefaxed at the time it is filed to its counsel, John E. Kennedy, at the following telefax number (713) 615-5273. Williams Alaska Pipeline Company, L.L.C.

requests that any protest to its enclosed filing be telefaxed to its counsel, Tim McCoy, at the following telefax number (918) 573-8024.

I hereby certify that on or before this day a copy of the enclosed tariffs has been sent to each subscriber on the subscriber list of the appropriate TAPS Carrier by first-class mail or other agreed-upon means of transmission.

Any questions regarding the accompanying tariff should be addressed to John E. Kennedy at (713) 758-2550.

Respectfully submitted,

/s/ John E. Kennedy
John E. Kennedy

Counsel for Amerada Hess
Pipeline Corporation,
BP Pipelines (Alaska) Inc.,
ExxonMobil Pipeline Company,
Phillips Transportation
Alaska, Inc., and
Unocal Pipeline Company

Exhibit A

TAPS Quality Bank

Index Ratio & Price Adjustments

Effective: February, 2003

Nelson-Farrar Index Ratio

Index Ratio: 422.0 / 443.4 = 0.9518

Index Date	Issue Date	Index
Sep-2000	2/5/2001	458.7
Oct-2000	3/5/2001	458.7
Nov-2000	4/2/2001	454.8
Dec-2000	5/7/2001	457.9
Jan-2001	6/4/2001	464.6
Feb-2001	7/2/2001	459.4
Mar-2001	8/6/2001	435.0
Apr-2001	9/3/2001	433.1
May-2001	10/1/2001	426.6
Jun-2001	11/5/2001	424.6
Jul-2001	12/3/2001	426.0
Aug-2001	1/7/2002	421.4
	Average	443.4

Index Date	Issue Date	Index
Sep-2001	2/4/2002	426.6
Oct-2001	3/4/2002	417.7
Nov-2001	4/1/2002	415.8
Dec-2001	5/6/2002	410.3
Jan-2002	6/3/2002	412.4
Feb-2002	7/1/2002	414.1
Mar-2002	8/5/2002	418.4
Apr-2002	9/2/2002	424.5
May-2002	10/7/2002	427.1
Jun-2002	11/4/2002	431.0
Jul-2002	12/2/2002	433.1
Aug-2002	1/6/2003	433.4
	Average	422.0

Reference Price Adjustments

(This year's Price Adjustments) = (Last year's Price Adjustments) x (Index Ratio)

	Gulf Coast		West Coast	
	(¢/Gal)	($/BBL)	(¢/Gal)	($/BBL)
Light Distillate				
2002	-0.5412	-0.2273	-0.5412	-0.2273
2003	-0.5151	-0.2163	-0.5151	-0.2163
Heavy Distillate				
2002	-2.1641	-0.9089	-1.0821	-0.4545
2003	-2.0598	-0.8651	-1.0300	-0.4326
Resid				
2002	-4.8693	-2.0451	-4.8693	-2.0451
2003	-4.6347	-1.9466	-4.6347	-1.9466

Report Date: 01/14/2002

Supplement No. 3 to F.E.R.C No. 52 (Amerada)
Supplement No. 3 to F.E.R.C. No. 23 (BP)
Supplement No. 3 to F.E.R.C. No. 69 (ExxonMobil)
Supplement No. 3 to F.E.R.C. No. 4
(Phillips Transportation)
Supplement No. 3 to F.E.R.C. No. 206 (Unocal)
Supplement No. 3 to F.E.R.C No. 4 (Williams)

AMERADA HESS PIPELINE CORPORATION
(AMERADA)
BP PIPELINES (ALASKA) INC. (BP)
EXXONMOBIL PIPELINE COMPANY
(EXXONMOBIL)
PHILLIPS TRANSPORTATION ALASKA, INC.
(PHILLIPS TRANSPORTATION)
UNOCAL PIPELINE COMPANY (UNOCAL)
WILLIAMS ALASKA PIPELINE COMPANY, L.L.C.
(WILLIAMS)

LOCAL PIPELINE TARIFF
CONTAINING THE TAPS
QUALITY BANK METHODOLOGY

GENERAL APPLICATION

ISSUED JANUARY 24, 2003
EFFECTIVE FEBRUARY 1, 2003

This tariff shall apply only to those tariff' which specifically incorporate this thrift supplements so this tariff and successive issues hereof by reference.

SPECIAL PERMISSION REQUESTED

Issued on seven days' notice under authority of 18 C.F.R. § 341.14. This tariff publication is conditionally accepted subject to refund pending a 30-day review period.

The increases noted in Attachment 2C are made to comply with this Commission's Order Adopting Contested Settlement in Docket No. OR89-2-007, *et al., Trans Alaska Pipeline System,* 81 F.E.R.C. 1 61,319 (1997), and the Alaska Public Utilities Commission's Order Adopting Federal Energy Regulatory Commission Order Approving Contested Settlement in Docket Nos. P89-1, *et al, In re Formal Complaint of Tesoro Alaska Petroleum Co.,* Order P89-1(87) (1998).

For rules and regulations other than the TAPS Quality Bank Methodology tariff, see F.E.R.C. No. 41 (Armada), F.E.R.C. No. 26 (BP), F.E.R.C. No. 110 (ExxonMobil), F.E.R.C. No. 10 (Phillips Transportation), F.E.R.C No. 189 (Unocal), F.E.R.C. No 2 (Williams), supplements thereto and reissues thereof.

The provisions published herein will, if effective, not result in an effect on the quality of the human environment.

Issued By

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Attachment 2C cancels Attachment 2B

ATTACHMENT 2C

COMPONENT UNIT VALUE PRICING BASIS

PROPANE (C_3)

United States Gulf Coast	United States West Coast
Platt's Mt. Belvieu, TX spot quote for Propane.	OPIS's (weekly) Los Angeles delivered spot quote for Propane

ISOBUTANE (IC_4)

United States Gulf Coast	United States West Coast
Platt's Mt. Belvieu, TX spot quote for Isobutane	OPIS's (weekly) Los Angeles delivered spot quote for Isobutane

NORMAL BUTANE (nC_4)

United States Gulf Coast	United States West Coast
Platt's Mt. Belvieu, TX spot quote for Normal Butane	OPIS's (weekly) Los Angeles delivered spot quote for Normal Butane

LIGHT STRAIGHT RUN (C_5 - 175°)

United States Gulf Coast	United States West Coast
Platt's Mt. Belvieu, TX spot quote for Natural Non-Dynergy	OPIS's (weekly) Los Angeles delivered spot quote for Natural Gasoline

NAPHTHA (175° - 350°F)

United States Gulf Coast	United States West Coast
Platt's U.S Gulf Coast spot quote for Waterborne Naptha	Platt's U.S Gulf Coast spot quote for Waterborne Naptha

LIGHT DISTILLATE (350° - 450°F)

United States Gulf Coast	United States West Coast
Platt's U.S. Gulf Coast, spot quote for Waterborne Jet Kerosene 54 less 0.5151 cents per gallon [D]	Platt's U.S. West Coast, spot quote for Waterborne Jet Fuel less 0.5151 cents per gallon [D]

HEAVY DISTILLATE (450° - 650°F)

United States Gulf Coast	United States West Coast
Platt's U.S. Gulf coast, spot quote for Waterborne No. 2 less 2.0598 cents per gallon [D]	Platt's U.S. West Coast, spot quote for Waterborne Gasoil for October, 1999 less 0.9973 cents per gallon

GAS OIL (650° - 1050°F)

United States Gulf Coast	United States West Coast
OPSI's U.S. Gulf Coast spot for barge High Sulfur VGO	Platt's U.S. West Coast, spot quote for barge High Sulfur VGO

RESID (1050°F and Over)

United States Gulf Coast	United States West Coast
Platt's U.S. Gulf Coast spot quote for Waterborne No. 6 Fuel Oil 3.0% Sulfur less 4.6347 cents per gallon	Platt's U.S. West Coast, spot quote for Pipeline 380 cst at Los Angeles converted to $/Bbl using 6.37 Bbl/MT less 4.6347 cents per gallon [D]

Explanation of symbols:

[D] Decrease
[W] Change in wording only

Quality Bank Tariff
Filing January 2004, FERC Docket Nos.
IS04-149-000 through IS04-153-000

-————]

[Logo

January 16, 2004

OIL PIPELINE FILING
SPECIAL PERMISSION REQUESTED

Magalie Sales, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: BP Pipelines (Alaska) Inc. Supplement No. 6 to F.E.R.C. No. 23 ExxonMobil Pipeline Company Supplement No. 6 to F.E.R.C. No. 69 Phillips Transportation Alaska, Inc. Supplement No. 6 to F.E.R.C. No. 4 Unocal Pipeline Company Supplement No. 6 to F.E.R.C. No. 206; Williams Alaska Pipeline Company, L.L.C. Supplement No. 6 to F.E.R.C. No. 4

Dear Ms. Salas:

Enclosed for filing are three copies of each of the following identical tariffs:

BP Pipelines (Alaska) Inc. Supplement No. 6 to F.E.R.C. No. 23; ExxonMobil Pipeline Company Supplement No. 6 to F.E.R.C. No. 69 Phillips Transportation Alaska, Inc. Supplement No. 6 to F.E.R.C. No. 4 Unocal Pipeline Company Supplement No. 6 to F.E.R.C. No. 206; Williams Alaska Pipeline Company, L.L.C. Supplement No. 6 to F.E.R.C. No. 4

The companies issuing these tariffs are collectively referred to herein as the TAPS Carriers.

On December 17, 1997 the Federal Energy Regulatory Commission issued Order Approving Contested Settlement in Docket Nos. OR89-2-007, *et al. Trans Alaska Pipeline System,* 81 F.E.R.C. ¶ 61,319 (1997). On January 13, 1998 the Alaska Public Utilities Commission ("APUC") issued its Order Adopting Federal Energy Regulatory Commission Order Approving Contested Settlement in Docket Nos. P-89-1, *et al. In re Formal Complaint of Tesoro Alaska Petroleum Co.,* Order P-89-1(87) (1998). One of the terms of the settlement approved by the Commission and the APUC is embodied in Item III.G.4. of the tariffs to which the enclosed tariffs are supplements. It requires that the adjustments to the reference prices for Light Distillate, Heavy Distillate and Resid in Attachment 2 to the tariffs be revised each year in accordance with a specified formula.

The enclosed tariffs are filed in compliance with the orders of this Commission and the APUC and Item III.G.4. of the tariffs. Attachment 2F reflects revised adjustments to the reference prices for the Light Distillate, Gulf Coast Heavy Distillate and Resid components for the year 2003 calculated in accordance with the method prescribed in Item 111.0.4. A table showing the calculation is attached as Exhibit A.

In accordance with orders of this Commission and the APUC's successor, the Regulatory Commission of Alaska ("RCA") and Item III.G.5. of the tariffs, the reference price of West Coast Heavy Distillate has not been revised. Pending a final decision by the Commission and the RCA on the appropriate processing cost adjustment to the replacement product price,

the Quality Bank continues to use the October 1999 adjusted reference price for West Coast Heavy Distillate. *See Trans Alaska Pipeline System*, 90 F.E.R.C. ¶ 61,123 (2000); *In re Filing of a Notice by the Trans Alaska Pipeline System Quality Bank Administrator*, P-99-12(2) (2000).

Although the enclosed tariff uses the symbol [U] for "Unchanged rate" in Attachment 2F, the figure following that symbol is not, in fact, a rate, but an adjustment to a reference price used in the Quality Bank methodology.

Pursuant to Section 6(3) of the Interstate Commerce Act and 18 C.F.R. § 341.14, the TAPS Carriers request special permission for the enclosed tariffs to be effective on February 1, 2004, which is fifteen days' notice. As noted above, these tariffs are filed to comply with the orders of this Commission and the APUC and Item III.G.4. of the presently effective Quality Bank Methodology tariffs. Moreover, the data necessary to calculate the revised adjustments (from the January *Oil & Gas Journal)* is not available in time to make the required tariff filing more than 30 days prior to February 1, 2004. Because the Quality Bank adjustments are calculated on a monthly basis, it is important that the tariff revisions become effective on February 1, 2004.

Pursuant to 18 C.F.R. § 343.3 of the Commission's regulations, each of the TAPS Carriers other than Williams Alaska Pipeline Company, L.L.C. hereby requests that any protest to its enclosed filing be telefaxed at the time it is filed to its counsel, John E. Kennedy, at the following telefax number (713) 615-5273. Williams Alaska Pipeline Company, L.L.C. requests that any protest to its enclosed filing be

telefaxed to its counsel, Timothy E. McCoy, at the following telefax number: (918) 573-8024.

I hereby certify that on or before this day a copy of the enclosed tariffs has been sent to each subscriber on the subscriber list of the appropriate TAPS Carrier by first-class mail or other agreed-upon means of transmission.

Any questions regarding the accompanying tariff should be addressed to John E. Kennedy at (713) 758-2550.

Respectfully submitted,

/s/ John E. Kennedy
John E. Kennedy

Counsel for BP Pipelines
(Alaska) Inc.,
ExxonMobil Pipeline Company,
Phillips Transportation Alaska,
Inc., and
Unocal Pipeline Company

Exhibit A

TAPS Quality Bank

Index Ratio & Price Adjustments

Effective: February, 2004

Nelson-Farrar Index Ratio

Index Ratio: 460.7 / 422.0 =	1.0916

Index Date	Issue Date	Index	Index Date	Issue Date	Index
Sep-2001	2/4/2002	426.6	Sep-2002	2/3/2003	448.2
Oct-2001	3/4/2002	417.7	Oct-2002	3/3/2003	453.2
Nov-2001	4/1/2002	415.8	Nov-2002	4/7/2003	448.2
Dec-2001	5/6/2002	410.3	Dec-2002	5/5/2003	450.5
Jan-2002	6/3/2002	412.4	Jan-2003	6/2/2003	461.4
Feb-2002	7/1/2002	414.1	Feb-2003	7/7/2003	478.8
Mar-2002	8/5/2002	418.4	Mar-2003	8/4/2003	485.3
Apr-2002	9/2/2002	424.5	Apr-2003	9/8/2003	459.3
May-2002	10/7/2002	427.1	May-2003	10/6/2003	455.2
Jun-2002	11/4/2002	431.0	Jun-2003	11/3/2003	461.2
Jul-2002	12/2/2002	433.1	Jul-2003	12/1/2003	465.5
Aug-2002	1/6/2003	433.4	Aug-2003	1/5/2004	461.7
	Average	422.0		Average	460.7

Reference Price Adjustments

(This year's Price Adjustments) = (Last year's Price Adjustments) x (Index Ratio)

	Gulf Coast		West Coast	
	(¢/Gal)	($/BBL)	(¢/Gal)	($/BBL)
Light Distillate				
2003	-0.5151	-0.2163	-0.5151	-0.2163
2004	-0.5623	-0.2362	-0.5623	-0.2362
Heavy Distillate				
2003	-2.0598	-0.8651	-1.0300	-0.4326
2004	-2.2485	-0.9444	-1.1243	-0.4722
Resid				
2003	-4.6347	-1.9466	-4.6347	-1.9466
2004	-5.0592	-2.1249	-5.0592	-2.1249

Report Date: 1/9/2004

Supplement No. 6 to F.E.R.C. No. 23 (BP),
Supplement No. 6 to F.E.R.C. No. 69 (ExxonMobil)
Supplement No. 6 to F.E.R.C. No. 4 (Phillips Transportation)
Supplement No. 6 to F.E.R.C. No. 206 (Unocal)
Supplement No. 6 to F.E.R.C. No. 4 (Williams)

Cancels Supplement No. 5 for the respective FERC tariffs listed above

BP PIPELINES (ALASKA) INC. (BP)
EXXONMOBIL PIPELINE COMPANY (EXXONMOBIL)
PHILLIPS TRANSPORTATION ALASKA, INC. (PHILLIPS TRANSPORTATION)
UNOCAL PIPELINE COMPANY (UNOCAL)
WILLIAMS ALASKA PIPELINE COMPANY, L.L.C. (WILLIAMS)

LOCAL PIPELINE TARIFF

CONTAINING THE TAPS QUALITY BANK METHODOLOGY

Issued January 16 2004
Effective February 1, 2004

GENERAL APPLICATION

This tariff shall apply only to those tariffs which specifically incorporate this tariff supplements to this tariff and successive issues hereof, by reference.

NOTICES

The changes noted in Attachment [W] 2F are made to comply with *this* Commission's Order Adopting Contested Settlement in Docket No. OR89-2-007, *et al., Trans Alaska Pipeline System,* 81 F.E.R.C. ¶ 61,319 (1997), and the Alaska Public Utilities

Commission's Order Adopting Federal Energy Regulatory Commission Order Approving Contested Settlement in Docket Nos. P-89-1, *et at, In re Formal Complaint of Tesoro Alaska Petroleum Co.,* Order P-89-1(87) (1998).

For rules and regulations other than the TAPS Quality Bank Methodology tariff see F.E.R.C. No. 26 (BP), F.E.R.C. No. [W] 161 (ExxonMobil), F.E.R.C. No. [W] 14 (Phillips Transportation), F.E.R.C. No. 189 (Unocal), F.E.R.C. No. 2 (Williams), supplants thereto and reissues thereof.

The provisions published herein will, if effective, not result in an effect on the quality of the human environment.

SPECIAL PERMISSION REQUESTED

Issued on fifteen days' notice under authority of 18 C.F.R. § 341.14. This tariff publication is conditionally accepted subject to refund pending a 30-day review period.

ISSUED BY

Donald C. Lutken, Jr.,
President
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Vice President and
Controller
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Tina R. Changer,
Manager, Pipeline Tariffs
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COMPANY, LLC
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Tulsa, Oklahoma 74119

COMPILED BY
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1001 Fannin Street
Houston, Texas 77002
(713)758-2550

Attachment 2F cancels Attachment 2E

ATTACHMENT 2F

COMPONENT UNIT VALUE PRICING BASIS

PROPANE (C_3)

United States Gulf Coast	United States West Coast
Platt's Mt. Belvieu, TX spot quote for Propane.	OPIS's (weekly) Los Angeles delivered spot quote for Propane.

ISOBUTANE (IC_4)

United States Gulf Coast	United States West Coast
Platt's Mt. Belvieu, TX spot quote for Isobutane.	OPIS's (weekly) Los Angeles delivered spot quote for Isobutane.

NORMAL BUTANE (nC_4)

United States Gulf Coast	United States West Coast
Platt's Mt. Belvieu, TX spot quote for Normal Butane.	OPIS's (weekly) Los Angeles delivered spot quote for Normal Butane.

LIGHT STRAIGHT RUN (C_5 - 175°F)

United States Gulf Coast	United States West Coast
Platt's Mt. Belvieu, TX spot quote for Natural Non-Dynegy.	OPIS's (weekly) Los Angeles delivered spot quote for Natural Gasoline.

NAPHTHA (175° - 350°F)

United States Gulf Coast	United States West Coast
Arithmetic average of (1) Platt's U.S. Gulf Coast spot quote for Waterborne Heavy Naptha and (2) Platt's U.S. Gulf coast spot	Arithmetic average of (1) Platt's U.S. Gulf Coast spot quote for Waterborne Heavy Naptha and (2) Platt's U.S. Gulf coast spot

quote for Waterborne Heavy Naptha Barge	quote for Waterborne Heavy Naptha Barge

LIGHT DISTILLATE (350° - 450°F)

United States Gulf Coast	United States West Coast
Platt's U.S. Gulf Coast spot quote for Waterborne Jet Kerosene 54 less [I] 0.5623 cents per gallon	Platt's U.S. Gulf Coast spot quote for Waterborne Jet Kerosene 54 less [I] 0.5623 cents per gallon

HEAVY DISTILLATE (450° - 650°F)

United States Gulf Coast	United States West Coast
Platt's U.S. Gulf Coast spot quote for Waterborne No. 2 less[I] 2.2485 cents per gallon	Platt's U.S. Gulf Coast spot quote for Waterborne Gasoil for October 1999 less [U] 0.9973 cents per gallon

GAS OIL (650° - 1050°F)

United States Gulf Coast	United States West Coast
OPSI's U.S. Gulf Coast spot quote for barge High Sulfur VGO	OPSI's U.S. Gulf Coast spot quote for barge High Sulfur VGO

RESID (1050°F and Over)

United States Gulf Coast	United States West Coast
Platt's U.S. Gulf Coast spot quote for Waterborne No. 6 Fuel Oil 3.0% Sulfur less [I] 5.0592 cents per gallon	Platt's U.S. Gulf Coast spot quote for Pipeline 380 cst at Los Angeles converted to $/Bbl using 6.37 Bbl/MT less[I] 5.0592 cents per gallon

Explanation of symbols:

[I] Increase
[U] Unchanged rate (adjustment)
[W] Change in wording only

Quality Bank Tariff
Filing January 2005, FERC Docket Nos.
IS05-121-000 through IS05-125-000

[Logo]

January 14, 2005

OIL PIPELINE FILING
SPECIAL PERMISSION REOUESTED

Magalie Sales, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: BP Pipelines (Alaska) Inc. Supplement No. 1 to F.E.R.C. No. 30; ExxonMobil Pipeline Company Supplement No. 1 to F.E.R.C. No. 218; ConocoPhillips Transportation Alaska, Inc. Supplement No. 1 to F.E.R.C. No. 3; Unocal Pipeline Company Supplement No. 1 to F.E.R.C. No. 273; Koch Alaska Pipeline Company, L.L.C. Supplement No. 1 to F.E.R.C. No. 4

Dear Ms. Salas:

Enclosed for filing are three copies of each of the following identical tariffs:

BP Pipelines (Alaska) Inc. Supplement No. 1 to F.E.R.C No. 30; ExxonMobil Pipeline Company Supplement No. 1 to F.E.R.C. No. 218; ConocoPhillips Transportation Alaska, Inc. Supplement No. 1 to F.E.R.C. No. 3; Unocal Pipeline Company Supplement No. 1 to F.E.R.C. No. 273; Koch Alaska Pipeline Company, L.L.C. Supplement No. 1 to F.E.R.C. No. 4

The companies issuing these tariffs are collectively referred to herein as the TAPS Carriers.

On December 17, 1997 the Federal Energy Regulatory Commission issued Order Approving Contested Settlement in Docket Nos. OR89-2-007, *et al. Trans Alaska Pipeline System,* 81 F.E.R.C. ¶ 61,319 (1997). On January 13, 1998 the Alaska Public Utilities Commission ("APUC") issued its Order Adopting Federal Energy Regulatory Commission Order Approving Contested Settlement in Docket Nos. P-89-1, *et al. In re Formal Complaint of Tesoro Alaska Petroleum Co.,* Order P-89-1(87) (1998). One of the terms of the settlement approved by the Commission and the APUC is embodied in Item III.G.4. of the tariffs to which the enclosed tariffs are supplements. It requires that the adjustments to the reference prices for Light Distillate, Heavy Distillate and Raid in Attachment 2 to the tariffs be revised each year in accordance with a specified formula.

The enclosed tariffs are filed in compliance with the orders of this Commission and the APUC and Item III.G.4. of the tariffs. Attachment 2G reflects revised adjustments to the reference prices for the Light Distillate, Gulf Coast Heavy Distillate and Resid components for the year 2005 calculated in accordance with the method prescribed in Item III.G.4. A table showing the calculation is attached as Exhibit A.

In accordance with orders of this Commission and the APUC's successor, the Regulatory Commission of Alaska ("RCA") and Item III.G.5. of the tariffs, the reference price of West Coast Heavy Distillate has not been revised. Pending a final decision by the Commission and the RCA on the appropriate processing cost adjustment to the replacement product price,

the Quality Bank continues to use the October 1999 adjusted reference price for West Coast Heavy Distillate. *See Trans Alaska Pipeline System,* 90 F.E.R.C. ¶161,123 (2000); *In re Filing of a Notice by the Trans Alaska Pipeline System Quality Bank Administrator,* P-99-12(2) (2000).

Although the enclosed tariff uses the symbol [U] for "Unchanged rate" in Attachment 2G, the figure following that symbol is not, in fact, a rat; but an adjustment to a reference price used in the Quality Bank methodology.

Pursuant to Section 6(3) of the Interstate Commerce Act and 18 C.F.R. § 341.14, the TAPS Carriers request special permission for the enclosed tariffs to be effective on February 1, 2005, which is seventeen days' notice. As noted above, these tariffs are filed to comply with the orders of this Commission and the APUC and Item III.G.4. of the presently effective Quality Bank Methodology tariffs. Moreover, the data necessary to calculate the revised adjustments (from the January *Oil & Gas Journal*) *is* not available in time to make the required tariff filing more than 30 days prior to February 1, 2005. Because the Quality Bank adjustments are calculated on a monthly basis, it is important that the tariff revisions become effective on February 1, 2005.

Pursuant to 18 C.F.R. § 343.3 of the Commission's regulations, each of the TAPS Carriers other than Koch Alaska Pipeline Company, L.L.C. hereby requests that any protest to its enclosed filing be telefaxed at the time it is filed to its counsel, John E. Kennedy, at the following telefax number. (713) 615-5273. Koch Alaska Pipeline Company, L.L.C. requests that any protest to its enclosed filing be

telefaxed to its counsel, John B. Rudolph, at the following telefax number: (202) 973-1212.

I hereby certify that on or before this day a copy of the enclosed tariffs has been sent to each subscriber on the subscriber list of the appropriate TAPS Carrier by first-class mail or other agreed-upon means of transmission.

Any questions regarding the accompanying tariff should be addressed to John E. Kennedy at (713) 758-2550.

Respectfully submitted,

/s/ John E. Kennedy
John E. Kennedy
Counsel for BP Pipelines
(Alaska) Inc.,
ExxonMobil Pipeline Company,
Conoco Phillips Transportation
Alaska, Inc., and
Unocal Pipeline Company

Exhibit A

TAPS Quality Bank

Index Ratio & Price Adjustments

Effective: February, 2005

Nelson-Farrar Index Ratio

Index Ratio: 473.1 / 460.7 = 1.0269

Index Date	Issue Date	Index	Index Date	Issue Date	Index
Sep-2002	2/3/2003	448.2	Sep-2003	2/2/2004	461.1
Oct-2002	3/3/2003	453.2	Oct-2003	3/1/2004	463.9
Nov-2002	4/7/2003	448.2	Nov-2003	4/5/2004	466.2
Dec-2002	5/5/2003	450.5	Dec-2003	5/3/2004	457.4
Jan-2003	6/2/2003	461.4	Jan-2004	6/7/2004	470.8
Feb-2003	7/7/2003	478.8	Feb-2004	7/5/2004	471.8
Mar-2003	8/4/2003	486.3	Mar-2004	8/2/2004	471.8
Apr-2003	9/8/2003	459.3	Apr-2004	9/8/2004	471.5
May-2003	10/6/2003	455.2	May-2004	10/4/2004	480.1
Jun-2003	11/3/2003	461.2	Jun-2004	11/1/2004	486.2
Jul-2003	12/1/2003	465.5	Jul-2004	12/6/2004	488.0
Aug-2003	1/5/2004	481.7	Aug-2004	1/3/2005	488.2
	Average	460.7		Average	473.1

Reference Price Adjustments

(This year's Price Adjustments) = (Last year's Price Adjustments) x (Index Ratio)

	Gulf Coast		West Coast	
	(¢/Gal)	($/BBL)	(¢/Gal)	($/BBL)
Light Distillate				
2004	-0.5823	-0.2362	-0.5823	-0.2362
2005	-0.5774	-0.2425	-0.5774	-0.2425
Heavy Distillate				
2004	-2.2486	-0.9444	-1.1243	-0.4722
2005	-2.3090	-0.9698	-1.1545	-0.4849
Resid				
2004	-5.0582	-2.1249	-5.0582	-2.1249
2005	-5.1963	-2.1820	-5.1963	-2.1820

Supplement No. 1 to F.E.R.C. No. 30 (BP)
Supplement No. 1 to F.E.R.C. No. 3 (ConocoPhillips)
Supplement No 1 to F.E.R.C. No. 218 (ExxonMobil)
Supplement No. 1 to F.E.R.C. No. 4 (Koch)
Supplement No. 1 to F.E.R.C. No. 273 (Unocal)

BP PIPELINES (ALASKA) INC. (BP);
CONOCOPHILLPS TRANSPORTATION ALASKA, INC. (CONOCOPHILLIPS); EXXONMOBIL PIPELINE COMPANY (EXXONMOBIL); KOCH ALASKA PIPELINE COMPANY, L.L.C. (KOCH); UNOCAL PIPELINE COMPANY (UNOCAL)

LOCAL PIPELINE TARIFF

CONTAINING THE TAPS
QUALITY BANK METHODOLOGY

ISSUED JANUARY 14, 2005
EFFECTIVE FEBRUARY 1, 2005

GENERAL APPLICATION

This tariff shall apply only to those tariffs which specifically incorporate this tariff, supple vans to this tariff and successive issues hereof by reference

NOTICES

The changes noted in Attachment [W] 2G are made to comply with this Commission's Order Adopting Contested Settlement in Docket No. OR89-2-007, *et al., Trans Alaska Pipeline System*, 81 F.E.R.C. ¶ 61,319 (1997), and the Alaska Public Utilities Commission's Order Adopting Federal Energy Regulatory Commission Order Approving Contested Settlement in Docket Nos. P-89-1 *et al. In re Formal Complaint of Tesoro Alaska Petroleum Co.,* Order P-89-1(87) (1998).

For rules and regulations other this the TAPS Quality Bank Methodology tariff see F.E.R.C. No. 26 (BP), F.E.R.C. No. (W) 6 (ConocoPhillips), F.E.R.C. No. 161 (ExxonMobil), *F.E.R.C.* No. 2 (Koch). F.E.R.C. No. 189 (Unocal), supplements thereto and mimics thereof.

The provisions published herein will, if effective, not result in an effect on the quality of the human environment.

SPECIAL PERMISSION REQUESTED

Issued on 17 days' notice under authority of 18 C.F.R. § 341.14. This tariff publication is conditionally accepted subject to refund pending a 30-day review period

ISSUED BY

Mike P. Tudor, President
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Joseph A. Blount,
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Houston, Texas 77002
(713) 758-2550

Attachment 2G cancels Attachment 2F

ATTACHMENT 2G

COMPONENT UNIT VALUE PRICING BASIS

PROPANE (C_3)

United States Gulf Coast	United States West Coast
Platt's Mt. Belvieu, TX spot quote for Propane	OPIS's (weekly) Los Angeles delivered spot quote for Propane.

ISOBUTANE (IC_4)

United States Gulf Coast	United States West Coast
Platt's Mt. Belvieu, TX spot quote for Isobutane	OPIS's (weekly) Los Angeles delivered spot quote for Isobutane.

NORMAL BUTANE (nC_4).,

United States Gulf Coast	United States West Coast
Platt's Mt. Belvieu, TX spot quote for Normal Butane	OPIS's (weekly) Los Angeles delivered spot quote for Normal Butane.

LIGHT STRAIGHT RUN (C_5 -175°F)

United States Gulf Coast	United States West Coast
Platt's Mt. Belvieu, TX spot quote for Natural Non-Dynegy	OPIS's (weekly) Los Angeles delivered spot quote for Natural Gasoline.

NAPHTHA (175° - 350°F)

United States Gulf Coast	United States West Coast
Arithemtic average of (1)Platt's U.S. Gulf Coast spot quote for Water-	Arithemtic average of (1)Platt's U.S. Gulf Coast spot quote for Water-

borne Heavy Naptha and (2) Platt's U.S. Gulf Coast spot quote for Water-borne Heavy Naptha Barge	borne Heavy Naptha and (2) Platt's U.S. Gulf Coast spot quote for Water-borne Heavy Naptha Barge

LIGHT DISTILLATE (350° - 450°F)

United States Gulf Coast	United States West Coast
Platt's U.S. Gulf Coast spot quote for Water-borne Jet Kerosene 54 less [I] 0.5774 cents per gallon	Platt's U.S. West Coast spot quote for Water-borne Jet Fuel less [I]0.5774 cents per gal-lon.

HEAVY DISTILLATE (450° - 650°F)

United States Gulf Coast	United States West Coast
Platt's U.S. Gulf Coast spot quote for Water-borne No. 2 less [I] 2.3090 cents per gallon	Platt's U.S. West Caost spot quote for Water-borne Gasoil for October 1999 less [U] 0.9973 cents per gallon.

GAS OIL (650° - 1050°F)

United States Gulf Coast	United States West Coast
Platt's Mt. Belvieu, TX spot quote for Propane	OPIS's (weekly) Los An-geles delivered spot quote for Propane.

RESID (1050°F and Over)

United States Gulf Coast	United States West Coast
Platt's U.S.Gulf Coast spot quote for Water-borne No.6 Fuel Oil 3.0% Slfur less [I] 5.1953 cents per gallon.	Platt's U.S West Coast spot quote for Pipeline 380 cst at Los Angeles converted to $/Bbl using 6.37 Bbl/MT less [I]5.1953 cents per gallon

Explanation of symbols:

[I] Increase

[U] Unchanged rate (adjustment)

[W] Change in wording only

APPENDIX B

Protest of Flint Hills Resources Alaska LLC to Compliance Filing of the TAPS Carriers

---

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. OR06-10-000

BP Pipelines (Alaska) Inc.
ConocoPhillips Transportation Alaska, Inc.
ExxonMobil Pipeline Company
Koch Alaska Pipeline Company
Unocal Pipeline Company

STATE OF ALASKA
REGULATORY COMMISSION OF ALASKA

Docket No. P-06-10

BP Pipelines (Alaska) Inc.
ConocoPhillips Transportation Alaska, Inc.
ExxonMobil Pipeline Company
Koch Alaska Pipeline Company
Unocal Pipeline Company

PROTEST OF FLINT HILLS RESOURCES ALASKA LLC TO COMPLIANCE FILING OF THE TAPS CARRIERS

Pursuant to Rule 211 of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.211 (2007), Flint Hills Resources Alaska LLC ("FHR") hereby submits its protest to the April 2, 2008 Compliance Filing of the TAPS Carriers in this matter. Specifically, FHR protests the proposed effective date of June 1, 2006 as violating Section 4412 of the Motor

Carrier Safety Reauthorization Act of 2005.[1] That law prohibits retroactive application of TAPS quality bank adjustments for any period that exceeds the 15-month period preceding the date of the first Commission order imposing new quality bank adjustments in this proceeding.

I. BACKGROUND

On March 25, 2008, the Commission issued Opinion No. 500[2] addressing "the processing cost adjustment to the West Coast Heavy Distillate cut under the current methodology for valuing the TAPS crude oil under Opinion No. 481."[3] The Commission did not calculate the total adjustment that would result from application of the findings in Opinion No. 500 regarding the various component cost elements, but directed the TAPS Carriers to make a compliance filing "establishing the processing cost adjustment for the West Coast Heavy Distillate cut."[4] The April 2, 2008 Compliance Filing at issue here was filed in response to that directive.

II. PROTEST

Section 4412(b)(2) of the Motor Carrier Safety Reauthorization Act of 2005, Pub. L. No. 109-59, effective August 10, 2005, provides in pertinent part that

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[1] Pub. L. No. 109-59, 119 Stat. 1714 (2005).

[2] *BP Pipelines (Alaska) Inc.*,122 FERC ¶ 61,236 (2008) ("Opinion No. 500").

[3] Opinion No. 500 at P 1, citing *Trans Alaska Pipeline System*, 113 FERC ¶61,062 (2005) (Opinion No. 481), *order on reh'ring*, 114 FERC ¶61,323 (Opinion No. 481-A) and 115 FERC ¶61,287 (2006) (Opinion No. 481-B), *aff'd Petro Star Inc. v. FERC* (D.C. Cir. No. 06-1166, *et al.* (March 6, 2008)).

[4] Ordering Paragraph B of Opinion No. 500.

"[i]n a proceeding commenced after the date of enactment of this Act, the Commission may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding." The complete text of Section 4412 is attached as Appendix A.

Section 4412(b)(2)'s directive is clear: in a case where the statute applies, FERC has no jurisdiction to order a retroactive change in the quality bank adjustments for any period that exceeds 15 months prior to issuance of the order imposing the changes, Here, there is no dispute as to the statute's applicability, as this proceeding was initiated after the statute's enactment date of August 10, 2005.[5] And, by proposing an effective date of June 1, 2006 for their compliance filing, the TAPS Carriers seek to impose retroactive quality bank adjustments.

The only issue then is how the 15-month statutory limit on retroactive adjustments is to be applied in this case, and that turns on identifying what is "the first order of the [FERC] *imposing* quality bank adjustments in the proceeding." (Emphasis added). There are only two possible choices: Opinion No. 500, affirming the Initial Decision's recommended principles for determining the various cost components that comprise the processing cost adjustment for West Coast Heavy Distillate, or a yet-to-be-issued order approving the specific adjustments that were formulated for the first time in the TAPS Carriers' instant compliance filing.

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[5] *See BP Pipelines (Alaska) Inc.*, 116 FERC ¶61,291 (2006).

Congress's use of the term "imposing" with regard to quality bank adjustments reflects the intent to refer to an order that approves the final quantification of a new adjustment. Absent such quantification, it is difficult to imagine how an adjustment can be "imposed" on shippers. Thus, while Opinion No. 500 approved *how* the adjustments should be calculated, it did not approve, establish or impose any specific *quantified* adjustments. To the contrary, Opinion No. 500, Ordering Para. (B), directed the TAPS Carriers to make a compliance filing "establishing" numerical cost adjustments that are consistent with the principles set out in the Opinion.

Thus, Section 4412's language is properly interpreted to mean that the Commission's eventual order approving the numerical quality bank adjustments calculated in the compliance filing will constitute the "first order. . . imposing quality bank adjustments." Neither Opinion No. 500 nor the underlying Initial Decision affirmed by that order contained any calculation of the quality bank adjustment for West Coast Heavy Distillate.[6] That calculation was made for the first time in the TAPS Carriers' compliance filing, and, until approved by the Commission, does not become an adjustment that can be "imposed" on TAPS quality bank participants.[7]

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[6] *See* Opinion No. 500 at P 172 (noting neither ID nor Opinion assigned values to required changes).

[7] The TAPS Carriers previously argued that the "first order" under Section 4412 should be interpreted to mean the September 26, 2006 Order setting this matter for hearing and approving use of an interim processing cost adjustment. *See* "Answer of Indicated TAPS Carriers etc.," at 5-6 (filed December 20, 2006). That interpretation runs contrary to clear Congressional intent, and would render the 15-month statutory limitation a nullity.

The legislative history is consistent with this interpretation. Congress intended that the permissible retroactive 15-month period end on the date of a Commission order approving adjustments that indicate exactly how much the change would cost refiners. The legislative history shows that Section 4412 originated with the introduction of two bills, S. 822 in the Senate and H.R. 2038 in the House. The former bill, which is attached as Appendix B, would have prohibited the Commission from making any retroactive adjustment. The remarks by the bill's sponsors explain that prospective application of any adjustments was intended to avoid the uncertainty created by adjustments occurring long after the crude oil was processed:

> The problem is that both of the refineries must make long- and short-term business decisions based on crude costs when they process crude oil into product. Refineries optimize their production slates based on current market realities. It is difficult for them to operate, given low profit margins, if oil values can change years later as a result of Quality Bank decisions. They simply have no way to make rational business decisions when the value of their products can be determined retroactively long after they can protect themselves for perceived mistakes in FERC-approved valuation methodologies. This certainly threatens the ability of the refineries to attract capital, money needed for them to modernize and meet new ultra-low sulfur diesel "clean fuel" requirements soon to go into effect.

151 Cong. Rec. S3752 (daily ed. April 15, 2005) statement of Sen. Murkowski).

The bill's sponsors described prohibiting retroactive application as the solution for that uncertainty:

> Requiring FERC to apply valuation methodology changes in connection with any future disputes on a prospective basis only will eliminate the risk and uncertainty associated with the prospect of nearly unlimited retroactive application of Quality Bank payment methodology changes. That will allow all Quality Bank participants to be able to conduct business with the certainty of knowing that prices received and paid for oil today cannot be altered years down the road.

Id.; see also id. at S.3752-53 (remarks of Sen. Stevens)("This legislation is necessary to limit business uncertainty with the use of the Trans Alaska Pipeline System, and to ensure continued domestic refinery activity in order to protect national fuel supplies.").

This discussion makes clear that the sponsors of the original bill intended to eliminate any uncertainty related to retroactive application by limiting quality bank adjustments to a prospective-only basis. "Prospective-only" for this purpose meant from the point in time when FERC determines what the exact amount of any new quality adjustments will be. *See id.* at S 3752 (remarks of Sen. Murkowski)("That will allow [refiners] to be able to conduct business with the certainty of knowing that price *received and paid for oil today* cannot be altered years down the road.") (emphasis added).

Obviously, S. 822 was not enacted as originally introduced. As is often the case with the legislative process, compromises were made. In this case, the legislation ultimately enacted replaced the originally-introduced "no retroactive/prospective-only" model

with a 15-month period of retroactive application.[8] But the initial "prospective-only" concept in the original bill suggests that the 15-month retroactive period ultimately enacted should be the period immediately preceding the date on which the new adjustments would be allowed on a "prospective-only" basis.[9] Or, stated another way, the legislative compromise allowed adjustments to go into effect 15 months earlier than would have been allowed under the original bills.

The issue thus becomes: on what date could the quality bank adjustments allowed by Opinion No. 500 go into effect on a prospective-only basis; that date would then serve as the end point for Section 4412's 15-month period. The precedent indicates that this cannot occur until after the FERC rulings at issue are translated into numerical adjustments that have been approved by the Commission. "FERC 'fixes' a

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[8] The 15-month period is similar to the 15-month refund period allowed by Section 206(b) of the Federal Power Act, 16 U.S.C. § 824e(b).

[9] The legislative history also makes clear that the term "retroactive" is intended to refer to *any* attempt to apply a change in the quality bank adjustment for a past period, including retroactive changes that, as here, are expressly authorized under the terms of the tariff. The legislation was directed toward avoiding any retroactive application of new quality bank adjustments in that situation, as suggested by Senator Murkowski's and Senator Stevens' references to a D.C. Circuit opinion "in 1999 [that] told FERC to revise some particular details of the Resid valuation and also held that FERC had 'failed to provide an adequate explanation' as to why the new methodology should not be made retroactive to 1993." 151 Cong. Rec. at S3751. Clearly, the referenced case is *Exxon Co., USA v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999), where the Court remanded the retroactivity question "because all of the TAPS shippers were on notice as of 1993 that the valuations were contested."

new rate on the date it approves a gas company's compliance filing that specifies its exact rates—not on the date of an earlier Commission opinion describing the legal and accounting principles to be used in calculating the new rates." *Panhandle Eastern Pipe Line Co. v. FERC,* 881 F.2d 1101, 1120 (D.C. Cir. 1989).

Like the situation in *Electrical Dist. No. 1 v. FERC,* 774 F.2d 490 (D.C. Cir. 1985), Opinion No. 500 determined the principles under which new quality bank adjustments would be set, but left for the TAPS Carriers and the QBA to translate those principles into specific, numerical quality bank adjustments through a compliance filing. Indeed, Opinion No. 500 at P 172 disclaimed that any valuation had been put on the adjustments by either the ALJs or the Commission:

> The law is clear that the ALJs are not required to determine the precise value that results from their rulings, and their obligation is only to decide the disputed issues presented to them by the parties. The ALJs properly left it to the QBA and the TAPS Carriers to calculate the precise value of the Heavy Distillate cut in compliance with the rulings in the ID or as modified by the Commission, a practice consistently followed by the Commission and upheld by the courts. Moreover, in prior TAPS Quality Bank Commission orders, the actual cost adjustment was left to the QBA, which the ALJs followed in this proceeding.

(Footnotes citing *Electrical District,* among other cases, omitted).

The necessity to translate those principles into specific quality bank adjustments through a compliance

filing was reinforced in Opinion No. 500, Ordering Paragraph (B), which states: "TAPS Carriers are hereby directed to make a compliance filing establishing the processing cost adjustment for the West Coast Heavy Distillate cut within thirty days of this order, unless there is a request for rehearing, in which case the compliance filing must be made within thirty days of a final order by the Commission." If anything, this language highlights the possible uncertainty related to when and how those principles would be translated to actual adjustments by relieving the Carriers of the need to make an immediate compliance filing on the possibility that rehearing requests could lead to some change in the Opinion No. 500 rulings, and thus to the exact adjustments that would go into effect.

The nature of the compliance filing here, four tables translating the Opinion No. 500 rulings into numerical adjustments, underscores that no quality bank adjustments had been fixed, and therefore could not be imposed, until the compliance filing was made. *See* Compliance Filing at 2 ("the processing cost adjustments to be used in the recalculation of Quality Bank adjustments" are the listed numerical cents per gallon adjustments). Based on the reasoning from *Electrical District,* 774 F.2d at 492, these facts indicate that any adjustment under Opinion No. 500 could neither go into effect nor be imposed until a compliance filing was made and approved:

> It is uncontested (and uncontestable) that under current FERC practice no numerical rate is specified until after the compliance filing is accepted. The assumption of the Commission's argument, however, is that to "fix" a rate within the meaning of the statute it is enough to pre-

> scribe the legal and accounting principles which, properly applied, will yield one particular rate; whereas petitioners maintain that the statute means what it says., and requires the rate itself to be specified. We agree with petitioners. . . .

The same conclusion applies here: Opinion No. 500 prescribed the legal and accounting principles that would be used to calculate the adjustments, but, as the quoted language from P 172 of the Opinion shows, those principles were not fixed into adjustments that could be imposed on shippers until the compliance filing was made.

In summary, given that quality bank adjustments at issue here must be fixed in numerical form by the compliance filing before they can be imposed, it follows that the first order imposing such adjustments, within the meaning of Section 4412, will not occur until Commission approval of the compliance filing. Consequently, the 15-month period under Section 4412 will not be calculable until the date of that future order approving the compliance filing, as that would be "the earliest date of the first order" imposing such adjustment in this proceeding. This means the new quality bank adjustments can go into effect no earlier than 15 months prior to the date of that order (*e.g.*, if an order approving the compliance filing issues on May 1, 2008, the earliest date on which the adjustments could go into effect would be February 1, 2007).

Accordingly, Flint Hills protests the proposed June 1, 2006 effective date, and requests that the Commission find that the quality bank adjustments allowed by Opinion No. 500 will not be fixed, and thus cannot be imposed within the meaning of Section 4412, until the date of an order approving the compliance filing

in this proceeding. At the time such an order issues, the Commission should determine the starting point of the statutory 15-month period, and allow the adjustments to go into effect as of that starting point.

Respectfully submitted,

/s/ Dennis Lane

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APPENDIX A

SEC. 4412. QUALITY BANK ADJUSTMENTS.

(a) DEFINITION OF TAPS QUALITY BANK ADJUSTMENTS.—In this section, the term "TAPS quality bank adjustments" means monetary adjustments paid by or to a shipper of oil on the Trans Alaska Pipeline System through the operation of a quality bank to compensate for the value of the oil of the shipper that is commingled in the Pipeline.

(b) PROCEEDINGS.—

(1) IN GENERAL.—In a proceeding commenced before the date of enactment of this Act, the Federal Energy Regulatory Commission may not order retroactive changes in TAPS quality bank adjustments for any period before February 1, 2000.

(2) PROCEEDINGS COMMENCED AFTER THE DATE OF ENACTMENT.—In a proceeding commenced after the date of enactment of this Act, the Commission may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding.

(c) DEADLINE FOR CLAIMS.—

(1) IN GENERAL.—A claim relating to a quality bank under this section shall be filed with the Federal Energy Regulatory Commission not later than 2 years after the date on which the claim arose.

(2) FINAL ORDER.—Not later than 15 months after the date on which a claim is filed under paragraph (1), the Federal Energy Regulatory Commis-

sion shall issue a final order with respect to the claim.

Motor Carrier Safety Reauthorization Act, Pub. L. No. 109-59, 119 Stat. 1714, 1778-79 (2005).

Appendix B

109TH CONGRESS
1ST SESSION
S.822

To prevent the retroactive application of changes to Trans-Alaska Pipeline Quality Bank valuation methodologies.

IN THE SENATE OF THE UNITED STATES

APRIL 15, 2005

Ms. MURKOWSKI (for herself and Mr. STEVENS) introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources

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A BILL

To prevent the retroactive application of changes to TransAlaska Pipeline Quality Bank valuation methodologies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. DEFINITIONS.

In this Act:

(1) COMMISSION.—The term "Commission"means the Federal Energy Regulatory Commission.

(2) TAPS QUALITY BANK VALUATION METHODOLOGIES.—The term "TAPS quality bank valuation methodologies" means valuation methodologies applied for the purpose of establishing mone-

tary adjustments paid by or to shippers of oil on the Trans-Alaska Pipeline (as authorized by the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.) through the operation of a quality bank to compensate for differentials in the value of shippers' oil commingled in the pipeline.

SEC. 2. FEDERAL ENERGY REGULATORY COMMISSION REVIEW OF TRANS-ALASKA PIPELINE CARRIER TARIFFS.

Pursuant to the ratemaking authority of the Commission under section 60501 of title 49, United States Code, in carrying out a review of Trans-Alaska Pipeline carrier tariffs, the Commission shall not approve any retroactive application of TAPS quality bank valuation methodologies.

SEC. 3. EFFECTIVE DATE.

This Act applies to orders of the Commission issued after December 31, 2005.

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(4)

Supreme Court, U.S.
FILED
NOV 19 2008
OFFICE OF THE CLERK

No. 08-212

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT PETRO STAR INC.

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QUESTION PRESENTED

Whether the Constitution forbids Congress from enacting a statute that imposes an explicit temporal limit on an administrative agency's yet-to-be-exercised equitable discretion to impose retroactive rates in a pending administrative ratesetting proceeding involving the Trans Alaska Pipeline System.

RULE 29.6 STATEMENT

Respondent Petro Star Inc. is a wholly owned subsidiary of Arctic Slope Regional Corporation. No publicly held company owns 10% or more of either corporation's stock.

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INTRODUCTION

Petitioner seeks review of the D.C. Circuit's unpublished decision rejecting all challenges to a Federal Energy Regulatory Commission (FERC) order that terminated a nearly 20-year-long ratemaking proceeding concerning oil transported in the Trans Alaska Pipeline System (TAPS). Specifically, Petitioner challenges the application of a new federal statute—enacted *before* FERC ruled in this case—that imposed a temporal limit on FERC's equitable discretion to give retroactive effect to certain rate changes affecting TAPS. Even though the statute affected only the future exercise of equitable discretion by an administrative agency, Petitioner ominously (and wrongly) contends that the statute usurps a "core *judicial* function" by "dictat[ing] the result[]" in a pending proceeding in violation of principles established in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). *See* Pet. 10-11 (emphasis added). For several reasons, the Petition presents no certworthy question, lacks merit, and should be denied.

The ruling below does not conflict with any decision of this Court or of any other court of appeals. Petitioner has failed to identify any federal appellate decision that has ever extended *Klein* to the administrative context, much less to an administrative ratemaking proceeding. On the contrary, this Court has consistently emphasized that Congress's power to affect "administrative orders" is significantly greater than its power to "affect[] judicial judgments." *Paramino Co. v. Marshall*, 309 U.S. 370, 381 n.25 (1940); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995) (constitutional limits on legislative reopening of federal court judgments did not apply to "administrative agencies"); *Glidden Co. v. Zdanok*, 370 U.S. 530, 568 (1962) (plurality) (*Klein* only applies to entities "invested with *judicial* power") (emphasis added). *See post*, pp. 17-21.

Moreover, the record in this case does not even raise the specific question presented, because the statute at issue did not "dictat[e]" any particular result. During the FERC proceedings, the parties raised a variety of contested points concerning whether retroactivity should be ordered and, if so, for what specific time frames. The statute did *not* attempt to resolve all of these issues, so as to specify a particular outcome. Instead, the statute preserved FERC's equitable discretion on these questions, subject only to the statute's imposition of an explicit cap on the *maximum* length of any period of retroactivity. *Post*, pp. 12-16. In addition, Petitioner's theory that the statute improperly singles out this ratemaking proceeding for differential treatment rests on a clear misinterpretation of the underlying statute: indeed, Congress arguably was *more* permissive in allowing retroactivity in this pending case than the statute allows in future cases. *Post*, pp. 28-30.

Collectively, these features make this case a particularly unsuitable vehicle for exploring Petitioner's novel and splitless issue concerning the reach of *Klein* in administrative ratemaking proceedings. The Petition should be denied.

STATEMENT

1. Congress passed the Trans Alaska Pipeline Authorization Act, 43 U.S.C. § 1651, *et seq.*, in order to facilitate the building of TAPS after major crude oil reserves were discovered on Alaska's North Slope. TAPS operates as a commingled pipeline. As a result, the value of the oil that a company places *into* TAPS may be different from the value of the homogenous oil that is delivered to all companies *from* TAPS

at its Valdez terminus. TAPS receives oil both from the North Slope fields and from commercial refineries along the pipeline (including those belonging to Respondent Petro Star) that receive their oil supplies from TAPS, distill the oil, retain some fractions to use as fuel or to manufacture products for sale, and return the remainder to TAPS.

The TAPS carriers who manage the pipeline established the "TAPS Quality Bank" system to adjust for these differences in value. At each point along the pipeline where oil is added to the common stream, the Quality Bank compares the relative value of that oil to the value of the common stream. Each shipper is then paid—or pays—the difference in value between the oil that it tendered into TAPS and the oil that it received from TAPS.

2. The current proceedings have a long and complex history extending back to 1989. In 1993, FERC approved, with modifications, a settlement implementing a new Quality Bank methodology. Under this so-called "distillation" or "assay" methodology, the relative value of each barrel of oil is determined by splitting the oil into its components, or "cuts," assigning a value to each cut, and then calculating the value of the whole barrel as the weighted average value of the different cuts. Where available, market prices were to be used as reference prices for the different cuts. However, appropriate reference prices were not available for all of the cuts. Accordingly, the settlement established a methodology for valuing the so-called "Resid" cut (which consists of the densest material in crude oil). After FERC approved this methodology with modifications, Exxon and several other parties petitioned for review of the order. The

D.C. Circuit granted the petition in part, rejected FERC's Resid valuation, and remanded the matter for further proceedings. *See OXY, U.S.A. v. FERC,* 64 F.3d 679, 694 (D.C. Cir. 1995).

3. Following the *OXY* remand, all of the parties to the proceeding except Exxon and Tesoro (Tesoro being the remaining Alaska refiner, and a competitor of the other refiners who are dependent on TAPS) reached a new settlement.[1] Among other things, this settlement provided a new methodology for valuing Resid and advanced a new rationale for this valuation. The settlement also provided that its new methodology would be prospective only, from the date that the settlement was approved by FERC.

Exxon contested the settlement, but after resolving the disputed issues on the merits, FERC approved it. Exxon again petitioned for review. The D.C. Circuit accepted in part and rejected in part the settlement's method for valuing Resid. *Exxon Co., USA v. FERC,* 182 F.3d 30 (D.C. Cir 1999). As to the retroactivity issue, the court "agree[d] that FERC does have a measure of discretion in determining when and if a rate should apply retroactively." *Id.* at 49. Ordinarily, "'the proper remedy is one that puts the parties in the position they would have been in had the error not been made,'" but the court acknowledged that there may be "other considerations properly within [FERC's] ambit [that] counsel otherwise" in any given case. *Id.* (citation omitted). The court held, however, that FERC had abused its discretion by failing

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[1] The parties that joined the settlement were ARCO Alaska, Inc.; BP Exploration (Alaska), Inc.; MAPCO Alaska Petroleum, Inc.; OXY USA, Inc.; Petro Star; Phillips Petroleum Company; Union Oil Company of California; and the State of Alaska.

adequately to explain why it did not make the changes retroactive to 1993. *Id.* at 49-50. The valuation of the Resid cut and the issue of retroactivity were remanded to FERC.

4. On remand, proceedings concerning these two issues were consolidated with proceedings addressing separate complaints that had been remanded by the subsequent decision in *Tesoro Alaska Petroleum Co. v. FERC*, 234 F. 3d 1286 (D.C. Cir. 2000), as well as with a new proceeding concerning another cut known as the "Heavy Distillate" cut. On the eve of the consolidated hearing before an Administrative Law Judge (ALJ), all parties entered into a stipulation that provided for a new Resid valuation methodology but that left open certain questions about what specific values the agreed-upon methodology should yield, as well as the question of whether to apply this valuation retroactively. The stipulation also established a reference price for Heavy Distillate and set a February 1, 2000 effective date for that new valuation (subject to certain adjustments that remained to be litigated).

Eight of the parties adopted a common position on all remaining issues except the valuation of another cut not at issue here.[2] They presented evidence establishing the equitable reasons why retroactive implementation of the new Resid valuation would not be appropriate. First, they explained how the Resid valuation was of crucial importance to the refiners. In particular, because the refiners retained little or

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[2] These "Eight Parties" were Petro Star; BP America Production Company; BP Exploration (Alaska) Inc.; ConocoPhillips Alaska, Inc.; OXY USA Inc.; the State of Alaska; Union Oil Company of California; and Williams Alaska Petroleum Inc.

no Resid, their "return oil" had a relatively higher concentration of Resid than the TAPS common stream. As a result, the retroactive assignment of a low value for Resid would hit the refiners particularly hard, because it would substantially reduce—after the fact—the overall value of their more Resid-heavy return oil. Second, the "Eight Parties" presented evidence showing how Quality Bank considerations can drive refiner decisions, in real time, about whether or not to manufacture particular products for particular markets. If Quality Bank payments are high, a refiner can mitigate that effect on its costs and profits by producing fewer fuel products that incur those costs—which in turn would reduce the total Quality Bank payments owed. Because refiners typically cannot make retroactive adjustments to the prices they received for fuel sold long ago, any retroactive Quality Bank adjustments can transform a decision that was good when made into a money-loser. The upshot of this evidence was that the equitable goal of placing all of the parties in the positions they would have occupied had FERC not erred in its original Resid valuation was now unobtainable.

Moreover, when FERC ordered a new distillation methodology in 1993, the refineries had no way of predicting a future Resid valuation or that it would be imposed retroactively. As of 1993, Exxon advocated a valuation method for Resid that was materially different from the approach finally stipulated in 2002. *Trans Alaska Pipeline System*, 65 FERC ¶ 61,277, at 62,282-62,288 (Nov. 30, 1993). As late as 1997, when it approved the settlement that followed the *OXY* remand, FERC itself believed that prospective implementation of a new Resid valuation was appropriate. *Trans Alaska Pipeline System*, 81 FERC

¶ 61,319 at 62,467 (Dec. 17, 1997). Because Petitioner was unsuccessful in urging retroactive application of the Resid cut until the court of appeals' 1999 *Exxon* decision first ordered FERC to re-examine the question, it did not appear probable before then that any retroactivity would be ordered. Moreover, even then, there was no way to predict the extremely low valuation that the ALJ would ultimately place on Resid (a valuation lower than that advocated by any party at the hearing). This Resid valuation, combined with the possibility that it might be imposed over a very long retroactive period, threatened the viability at least of Petro Star, a small Alaska-Native-owned business refiner.

The ALJ issued a lengthy "Initial Decision" that, *inter alia*, addressed the Resid retroactivity issue. *Trans Alaska Pipeline System*, 108 FERC ¶ 63,030 at 65,612-65,661 (Aug. 31, 2004). He held that the Eight Parties had made "a strong case based on equitable considerations for holding that the values of the remand cuts should be made effective on a prospective basis only." Pet. App. 171a. Nevertheless, the ALJ concluded that, "since the adoption of the distillation method there never had been a just and reasonable Resid proxy until this proceeding, and the proxy which is determined herein for Resid is the only just and reasonable value for it since December 1, 1993, and it must be *made effective on that date notwithstanding any equitable consideration*." *Id.*

The Eight Parties filed timely exceptions to the Initial Decision, contending (*inter alia*) that the ALJ had erred in ordering retroactive application of the new Resid valuation. Pet. App. 174a-183a. Pursuant to FERC's rules, these filings prevented the Initial

Decision from becoming a final decision of the Commission, 18 C.F.R. § 385.708(d), and FERC thus commenced its own review with "all the powers which it would have in making the initial decision." 5 U.S.C. § 557(b).

5. As the protracted Quality Bank litigation continued, Congress became concerned about its consequences. Pet. 6-7. On July 28, 2004, a House Conference Report stated: "Considering the specific equities of this case, the general importance of continued domestic refinery activity in order to protect national fuel supplies and the need to limit business uncertainty associated with the use of the Trans Alaska Pipeline System, Congress expects the Federal Energy Regulatory Commission to evaluate carefully the disputed Resid valuation and related retroactive refund matter affecting the TAPS Quality Bank Adjustments." H.R. REP. NO. 108-792 at 1640 (2004). On September 21, 2004, a Senate Appropriation Committee report expressed a similar view. S. REP. 108-353 at 146 (2004). Both reports observed that "[Congress] is particularly concerned about the equity of assigning retroactive refunds beyond a term of 15 months." H.R. REP. NO. 108-792 at 1640; S. REP. 108-353 at 146. In April 2005, the Alaska congressional delegation restated the views expressed by the Committees in a letter to FERC that was placed in the public record of the proceedings before it. Fearful of a legislative intervention, Exxon convinced an Alaska Senator in May 2005 "to delay pressing for a Congressional solution to give settlement talks more time to proceed." Pet. App. 205a.[3]

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[3] This successful exercise of Exxon's own First Amendment right to petition during Congress's evaluation of TAPS ratemaking

No settlement was reached, however, and while the proceedings still were pending before FERC, Congress enacted legislation aimed at the problems it had identified. *See* Pub. L. No. 109-59, § 4412, 119 Stat. 1144, 1778 (2005). Section 4412 requires FERC to conclude Quality Bank proceedings initiated after the statute's enactment within 15 months of their being filed, and prohibits FERC from ordering retroactive Quality Bank adjustments "for any period that exceeds the 15 month period immediately preceding the earliest date of the first order of the [FERC] imposing quality bank adjustments in the proceeding." *Id.*, § 4412(b)(2). For proceedings that were pending when section 4412 was enacted, however, Congress allowed more generous retroactivity, dating back to the fixed date of February 1, 2000. *Id.*, § 4412(b)(1).

6. On October 20, 2005, the Commission issued its Opinion No. 481 and Order on Initial Decision. Pet. App. 89a-201a. The Commission largely affirmed the Initial Decision, including its allowance of equitable refunds, but held that "as required by recent Congressional action," it would limit "any retroactive refunds resulting from the new valuations to February 1, 2000, rather than back to December 1, 1993." Pet App. 91a, 165a-166a.

Exxon again petitioned the D.C. Circuit for review. It contended that section 4412(b)(1) was unconstitutional because it applied only to the pending FERC proceeding resolved in Opinion No. 481 and thus de-

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belies Exxon's unfounded innuendo that the ultimate legislation was a product of some sort of "shocking mischief." Pet. 2. Moreover, Exxon's complaint that the ultimate legislation was adopted without "hearings or floor debate," Pet. 7, is irrelevant. *Cf. Marshall Field & Co. v. Clark*, 143 U.S. 649, 672-73 (1892).

nied Exxon substantive due process and equal protection of the laws, and also interfered with a pending adjudication in violation of the separation of powers. The court of appeals rejected these contentions in a brief unpublished decision. Pet. App. 1a, 4a.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to review the question whether Congress may usurp a "core judicial function" by "dictat[ing]" the outcome of a "pending adjudication" without amending the applicable law. Pet. 10, 14. The Petition can and should be denied for the simple reason that no such question is even presented by the D.C. Circuit's unpublished decision upholding the order issued by FERC in this case. The "adjudication" involved here was *not* a judicial proceeding, much less one involving the exercise of "core judicial function[s]"; rather, it was an *administrative* ratemaking proceeding involving the exercise of regulatory discretion. Moreover, by enacting temporal limits on the extent to which FERC could set rates retroactively for oil shipped in the TAPS, Congress did *not* "dictate" the outcome of the FERC proceeding; rather, it merely set an outer boundary on the agency's equitable discretion to impose retroactive rates to remedy its own errors. Under the statute, FERC retained substantial discretion that required it to resolve several contested points between the parties, and Congress did not purport to decide these issues or to direct a specific outcome. In addition, the statute *did* change the applicable law and did so *before* the agency had reached a decision about how to exercise its discretion. That Petitioner seeks to raise a contrived issue that is not actually presented on the record here is a sufficient reason to deny the Petition.

In addition, Petitioner's contention that the decision below conflicts with *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), is without merit, raises no split of authority, and does not warrant review. Petitioner has failed to identify any federal appellate decision—and Respondent is unaware of any—that extends *Klein* to *administrative* proceedings, much less to administrative *ratemaking* proceedings. Indeed, this Court has repeatedly indicated that *Klein* does not apply to such matters. And even if *Klein* did extend to such proceedings, there is no support for Petitioner's argument that Congress lacks the authority to regulate the exercise of *equitable discretion* in a pending administrative proceeding, especially where (as here) Congress acts *before* the agency exercises that discretion.

Petitioner's passing suggestion that the statute at issue here lacks a rational basis, Pet. 17, raises a meritless and factbound issue that is plainly uncertworthy. TAPS is a unique element of our Nation's overall energy supply system, and Congress could appropriately be concerned about the possible consequences flowing from the absence of fixed temporal limitations on FERC's ability to impose retroactive TAPS rates on shippers and refiners. Indeed, this Court has upheld statutes with a comparably narrow sweep affecting at most a handful of pending actions. *See, e.g., Robertson v. Seattle Audobon Soc'y*, 503 U.S. 429 (1992). Moreover, as set forth below, Petitioner's entire premise that the statute at issue unfairly imposes a different standard for this one case rests on a debatable (and, in Respondent's view, erroneous) construction of the statute as a whole—a contested legal issue that is currently the subject of a separate and unrelated pending FERC proceeding.

I. Petitioner's Novel Claim That Congress May Not Act to Narrow an Agency's Equitable Discretion in a Non-Final Administrative Ratemaking Proceeding Does Not Warrant Review

Petitioner's request to address the scope of *Klein* should be rejected because (1) this case does not present the broader issue Petitioner seeks to frame; (2) the decision below does not conflict with *Klein* or any other decision of this Court; and (3) the decision likewise does not conflict with that of any other court of appeals.

A. The Particular Question on Which Certiorari Is Sought Is Not Presented by the Facts of This Case

Petitioner asks this Court to review the question whether it is unconstitutional for Congress, without "amend[ing] applicable law," to "*direct*[] results" in a "single pending adjudication under old law." Pet. 14; *see also id.* at i (Congress cannot "*dicat*[*e*]" the remedy "in a single pending adjudication"); *id.* at 10 (Congress does not have a "blanket license to *dictate* the retrospective monetary relief available to private parties in a single case"); *id.* at 11-12 (Congress may not "pass[] laws that *dictate* the results in pending cases") (all emphases added). This question, however, is simply not presented here, because none of the predicates for the application of this supposed rule are present on the facts of this case.

1. Contrary to what Petitioner repeatedly suggests, section 4412 did *not* "direct" or "dictate" a particular result in the FERC proceeding at issue. In contrast to the extreme hypotheticals cited in the Petition, in

which Congress directs the entry of a judgment in a common-law cause of action for a specified amount, *see id.* at 20, Congress here simply imposed a temporal limit on the *range* of FERC's equitable discretion to impose retroactive rate changes in an administrative ratemaking proceeding.

At the time Congress enacted section 4412, the various Respondents were asserting a variety of different arguments before FERC concerning what Quality Bank rates should be and whether and to what extent any rates should be retroactive. These latter arguments included the following: that there should be no retroactivity at all, *see* Br. on Exceptions of the Eight Parties Before FERC at 93-158 (Nov. 16, 2004); that retroactivity should be limited to a later date (such as August 29, 2000, the date of the Eight Parties' settlement), *id.* at 170; and that there should be no retroactive award of interest, *id.* at 170 n.133. Petitioner's position, by contrast, was that there should be full retroactivity, with interest, all the way back to 1993. Pet. App. 4a. And after section 4412 was enacted, Respondents continued to press similar arguments that there should be no retroactivity at all, *id.* at 75a-77a, 174a-183a; that retroactivity should be limited to a later date (such as January 1, 2004), *id.* at 79a; and that there should be no retroactive interest, *id.* at 77a-79a, 183a. Congress's enactment of section 4412 did *not* determine which of these positions was correct, under old law. Instead, Congress simply imposed an outer limit on the extent to which FERC could exercise its equitable discretion to impose retroactive rate changes. It remained for FERC to decide, within those limits, how to exercise its discretion, and it did so: FERC ultimately decided to reject, on the merits, Respondents' various equita-

ble arguments for no retroactivity at all, for no retroactivity earlier than 2004, and for no retroactive interest. *Id.* at 79a-88a, 183a-192a.

Notably, FERC's retroactivity decision relied, in part, on the enactment of section 4412 in deciding to *reject* some of Respondents' equitable arguments. Pet. App. 81a (in light of Congress's prohibition on retroactivity earlier than February 1, 2000, "the validity of [certain Respondents'] equitable argument *has been undermined*") (emphasis added). Thus, to the extent that some Respondents argued that retroactivity was inequitable because they would have conducted their refining operations and sales activities differently if they had known that changes would be retroactive, FERC concluded that *these equities were no longer present in 2000*, which was *after* the D.C. Circuit had already held, in 1999, that retroactivity could be required. *Id.* (concluding that, after 1999, refiners "were on notice that they should modify their operations" and "after 1999, refiners could have protected themselves contractually"). This ruling only underscores that FERC retained substantial discretion to evaluate the equities as it saw fit.

Because section 4412 merely imposed an outer limit on the exercise of FERC's equitable discretion, while leaving to the agency the task of evaluating, within those limits, the numerous competing equitable arguments concerning retroactivity, there is simply no sense in which Congress can be said to have "dictated" or "directed" a specific outcome.[4]

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[4] Indeed, the materials submitted by Petitioner confirm that Congress deliberately refrained from attempting to direct a specific outcome to the pending FERC proceedings. Pet. App. 206a (Letter of Senator Murkowski to President of Petitioner Exxon

2. For similar reasons, Petitioner is simply wrong in stating that section 4412 does not "amend applicable law." Pet. 14. Prior to the enactment of the statute, FERC possessed discretion to determine whether to apply a rate retroactively to correct agency error, and this exercise of discretion was not subject to any explicit temporal limit. *See Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999) ("We agree that FERC does have a measure of discretion in determining when and if a rate should apply retroactively."). Congress thought the lack of any such express limitation to be excessive here, and it therefore imposed such limits in section 4412. That is a change in the applicable law, not a direction to reach a particular result under old law. *See Robertson*, 503 U.S. at 438 (statute "compelled changes in law, not findings or results under old law" where, *inter alia*, there was "nothing in [the statute] that purported to direct any particular findings of fact or applications of law, old or new, to fact").

Petitioner's suggestion that a statute cannot be said to amend applicable law unless it effects an amendment of *generally* applicable law, *see* Pet. 13, is flatly contradicted by *Robertson*. There, the Court expressly found that the statute at issue "*did* amend applicable law" even though it assertedly "swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases." 503 U.S. at 441 (emphasis in original); *see also id.* at 433

Mobil) ("[W]hile Congress could have imposed a final resolution in this case, we deliberately chose not to, allowing FERC to review the findings of its Administrative Law Judge and give all parties a fair opportunity to appeal FERC's decision from that review.").

& n.1 (noting that the statute only applied to timber sales from specified areas in Oregon and Washington that were then the subject of pending litigation).

3. Petitioner's characterization of this case as a "pending adjudication" is incorrect in two major respects. First, unlike *all* of the cases on which Petitioner relies, this case does not involve Congress's application of new law to a pending *judicial* proceeding. *See post*, 22-24. Although Petitioner contends that Congress's enactment of section 4412 represents an unconstitutional legislative "exercise of a core *judicial* function," Pet. 10 (emphasis added), no such question is presented here. Rather than presenting an opportunity to examine longstanding questions concerning "congressional power to have any individual *judicial* case among private parties decided as Congress wishes," *id.* at 18 (emphasis added), this case presents an entirely *novel* question concerning Congress's power over pending *administrative* proceedings. Second, even assuming *arguendo* that some administrative proceedings could be considered "adjudications" in a sense relevant here, a *ratemaking* proceeding is surely the poorest possible candidate for such a rule. As this Court has held, "[r]atemaking is an essentially legislative act," not an adjudicative one. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 371 (1989).

* * *

For all of these reasons, the factual context of this case does not properly present the particular question on which Petitioner seeks this Court's review. This factor alone is sufficient to warrant denial of the Petition.

B. There Is No Conflict With *Klein* or Any Decision of This Court

In any event, Petitioner is wrong in contending that this case conflicts with *Klein*. Petitioner can point to no decision of this Court even suggesting that *Klein* applies to *administrative* proceedings, much less to administrative *ratemaking* proceedings. Nor does any case from this Court support Petitioner's apparent position that Congress lacks the authority to regulate the exercise of equitable discretion in a pending administrative proceeding, even where (as here) Congress acts *before* there is final agency action purporting to exercise that discretion.

1. In *Klein*, Treasury agents seized, as abandoned property, a large amount of cotton owned by a Confederate sympathizer named V.F. Wilson. 80 U.S. at 132. However, the statute under which the cotton had been seized and sold allowed owners to file a claim in the Court of Claims upon satisfactory proof that the claimant owned the property and that "he has never given any aid or comfort to the present rebellion.'" *Id.* at 131 (citation omitted). After Wilson died, the administrator of his estate (Klein) filed a claim under the statute, showing that Wilson had owned the cotton and seeking compensation for its seizure. As proof of Wilson's loyalty, Klein relied upon Wilson's receipt of a Presidential pardon. *Id.* at 132. Specifically, President Lincoln had issued a proclamation in December 1863 granting a full pardon "with restoration of all rights of property" to anyone who would take a "prescribed oath of allegiance" and "keep and maintain said oath inviolate." *Id.* at 131-32. Wilson had taken the required oath in 1864 and "kept the same inviolate" until his death in 1865.

Id. at 132. In 1869, the Court of Claims ruled in Klein's favor and awarded him $125,300 for the seized cotton. The Government appealed the judgment to the Supreme Court. *Id.*

While the appeal was pending, the Supreme Court held in *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870), that the receipt of such a Presidential pardon established that the claimant "was as innocent in law as though he had never participated" in the rebellion, and that the statutory loyalty requirement for return of seized property was thereby satisfied. *Klein*, 80 U.S. at 133. Congress responded by passing a statute that provided, *inter alia*, that in any case in which the return of seized property was sought based on the claimant's receipt of a pardon that "'recite[d] in substance that such person took part in the late rebellion,'" then the pardon should be taken as "conclusive evidence" of the claimant's disloyalty and the suit was to be dismissed. *Id.* at 134 (citation omitted). Invoking this statute, the Government filed a motion to remand the case to the Court of Claims with instructions to dismiss Klein's suit. *Id.* at 130.

This Court held the statute unconstitutional, denied the Government's motion to remand, and instead affirmed the judgment in Klein's favor. The Court concluded that the clear purpose of the statute was "to deny to pardons granted by the President the effect which this court had adjudged them to have." 80 U.S. at 145. As such, the Court held that the statute suffered from two constitutional defects. First, the statute "prescribe[d] a rule for the decision of a cause in a particular way": if, based on *Padelford*'s construction of the effects of the pardon, the Court

found "that the judgment must be affirmed," the statute decreed that in that circumstance the Court was instead "directed to dismiss the appeal." *Id.* at 146. Upholding Congress's attempt to "prescribe rules of decision to the Judicial Department" in "cases pending before it," the Court reasoned, would "allow[] one party to the controversy to decide it in its own favor." *Id.* Second, the Court held that the statute was "also liable to just exception as impairing the effect of a pardon and thus infringing the constitutional power of the Executive." *Id.* at 147.

2. Neither of the two constitutional defects found in *Klein* is present in this case. This case, of course, does not involve any congressional attempt to infringe upon the Executive's pardon power. Nor does this case involve an attempt to "prescribe rules of decision *to the Judicial Department*," such that the *courts* are required to make a finding on a specific factual issue (in *Klein*, Wilson's loyalty) that is contrary to what is required, under the Court's precedents, on the record of the case. *Klein*, 80 U.S. at 146 (emphasis added). Here, Congress acted to limit the equitable discretion of an *administrative agency* in a ratemaking proceeding *before* that discretion was finally exercised; it did not, as in *Klein*, purport to direct a court to make specific findings or to enter a specific judgment that is contrary to the one an Article III court believed to be required by law.[5]

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[5] *Klein* involved an effort by Congress to direct *this Court*—which is, of course, an Article III Court—to enter a specific judgment that was contrary to the one the Court believed to be required by law. *Klein* also expressly characterized the Court of Claims as "one of those inferior courts which Congress authorizes" under Article III. 80 U.S. at 145. This Court subsequently rejected that characterization of the Court of Claims in *Williams*

As FERC correctly noted in its brief in the D.C. Circuit, Petitioner has "cited no case, and we know of none, in which *Klein* has been held to limit Congress's powers vis-à-vis administrative agencies." Ct. of App. Br. of FERC and U.S. at 75-76. Because there is no decision of this Court that even remotely suggests that *Klein* applies to administrative agencies, there is no conflict with the decisions of this Court. Indeed, what authority there is suggests exactly the opposite. The Court has long held that Congress's power to affect "administrative orders" is significantly greater than its power to "affect[] judicial judgments," *Paramino Co. v. Marshall*, 309 U.S. 370, 381 n.25 (1940), and the Court has likewise held that the constitutional limits on legislative reopening of *federal court* judgments do not apply to "administrative agencies." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995). And in *Glidden*, a plurality of the Court dismissed out of hand the notion that *Klein* would apply outside the context of *judicial* decisionmaking. *Glidden*, 370 U.S. at 568 (plurality) ("Surely no such concern would have been manifested [in *Klein*] if it had not been thought that the Court of Claims was invested with judicial power.").

Moreover, even assuming *arguendo* that *Klein* could extend to *some* administrative proceedings,

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v. United States, 289 U.S. 553, 568, 580-81 (1933), although *Williams* itself was abrogated 30 years later. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 552-58, 562-84 (1962) (plurality) (rejecting *Williams* as wrongly decided); *id.* at 586-87 (Clark, J. concurring in judgment) (*Williams* superseded by subsequent statutory changes confirming that the Court of Claims was an Article III court). (The Court of Claims no longer exists, and its successor, the Court of Federal Claims, is expressly declared to be an Article I court. 28 U.S.C. § 171(a).)

there is no decision of this Court that supports the view that it would apply to *this* sort of proceeding. As noted above, *ante*, p.16, this Court has held that "ratemaking is an essentially *legislative* act," not a judicial one. *New Orleans Pub. Serv.*, 491 U.S. at 371 (emphasis added); *see also Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 589 (1945) ("Rate-making is essentially a legislative function," because Congress had not provided a "formula" that required the agency to adopt one particular method). In addition, unlike *Klein*, this case does not involve a *judgment* recognizing and enforcing a party's statutory entitlement to a sum-certain. On the contrary, at the time Congress acted, there was no final agency action at all—the matter was still under review by FERC, which remained free to accept or reject the ALJ's Initial Decision as it saw fit. *See* 5 U.S.C. § 557(b) ("on ... review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule"). And the underlying non-final decision before FERC involved, not the recognition and enforcement of specific and unambiguously defined property rights, but rather the exercise of *equitable discretion*. *See Exxon Co.*, 182 F.3d at 49.

In short, there is no authority from this Court (or elsewhere, *see post*, pp. 22-24) that would support Petitioner's view that Congress lacks the authority to impose any limitations on an administrative agency's yet-to-be-finally-exercised equitable discretion in a rate-setting proceeding.

C. There Is No Conflict Among the Lower Courts

The Petition likewise presents no conflict among the circuits. As noted earlier, Petitioner cannot point to a single case in the lower courts that purports to apply *Klein* to an administrative proceeding. *Ante*, p.20. Each and every one of the cases cited in the Petition as supposedly creating a split involves a *judicial* proceeding, not an administrative rate-making. Moreover, none of the federal appellate cases cited by the Petition even finds a *Klein* violation to be present. Petitioner thus cannot point to *any* case in which a *Klein* violation has been found by another circuit court on even remotely similar facts. The lack of a split is plain, and the Petition should be denied.

1. Petitioner's effort to conjure a conflict among the circuits fails at the outset, because Petitioner completely ignores the critical, threshold issue of whether *Klein* applies in the administrative agency context at all. On that issue, the caselaw across the circuits is uniform: no court has ever extended *Klein* to the administrative context.

The cases Petitioner cites in support of its argument that the lower courts are divided over "*Klein*'s ultimate import" only serve to confirm that *Klein's* application is limited to the judicial branch. In *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997), the Seventh Circuit considered and rejected a contention that the restrictive standards for granting federal habeas relief in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) unconstitutionally infringed upon the "interpretive power of the

courts." *Id.* at 182 (emphasis added). In fact, most of the cases upon which Petitioner relies likewise address whether AEDPA usurps the authority of the *federal courts*. *See Crater v. Galaza*, 491 F.3d 1119, 1128 (9th Cir. 2007) (cited at Pet. 20) (no *Klein* issue because AEDPA "does not restrict the *federal courts'* power to interpret the law, but only sets standards for what state court errors of law require federal habeas relief") (emphasis added), *cert. denied*, 128 S. Ct. 2961 (2008); *Green v. French*, 143 F.3d 865, 874-75 (4th Cir. 1998) (cited at Pet. 20) (AEDPA "does not limit any inferior *federal court's* independent interpretive authority to determine the meaning of federal law in any *Article III* case or controversy") (emphases added); *Evans* v. *Thompson*, 518 F.3d 1, 11 (1st Cir. 2008) (cited at Pet. 21, 22) (noting that in *Klein*, "Congress had 'prescribed' a 'rule of decision,' thereby *encroaching on Article III*") (emphasis added), *cert. denied*, 129 S. Ct. 255 (2008).

The remaining cases cited by Petitioner likewise reinforce the view that *Klein*'s application is limited to the judiciary. *See Shawnee Tribe* v. *United States*, 423 F.3d 1204, 1217-18 (10th Cir. 2005) (cited at Pet. 20) (citing *Klein* and noting that the "principle of separation of powers does place some limits on the ability of Congress to dictate the work of the *Article III courts*") (emphasis added); *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 430 (1995) (cited at Pet. 21) (under *Klein* Congress lacks authority to "instruct[] a *court* automatically to enter a judgment pursuant to a decision the court has no authority to evaluate") (emphasis added), *cert. denied*, 522 U.S. 931 (1997); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 395 (2d Cir. 2008) (cited at Pet. 22) (under *Klein* "*Article III* forbids legislatures from

'prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it'") (emphasis added) (citation omitted); *District of Columbia* v. *Beretta U.S.A. Corp.*, 940 A.2d 163, 172-73 & n.7 (D.C. 2008) (cited at Pet. 22) (applying *Klein* to judicial proceeding and finding statute constitutional; declining to answer whether *Klein* extends to non-Article III "independent judicial bodies, including the District of Columbia courts").[6]

2. Petitioner nonetheless suggests that there is a split of authority in light of the court of appeals' reliance here on *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001), *cert. denied*, 537 U.S. 813 (2002). Because *National Coalition* rejected a *Klein* claim in the *judicial* context, Petitioner contends that the D.C. Circuit's reliance on that precedent here means that the decision below must somehow be understood as "announc[ing] a rule of unprecedented sweep that applies not only to agency adjudications, but also to any adjudication in court." Pet. 16. For multiple reasons, this argument fails.

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[6] Two of the opinions Petitioner cites are not even opinions for the court, but separate opinions respecting rehearing en banc. However, they too confirm that *Klein* applies only to judicial proceedings. *Davis v. Straub*, 445 F.3d 908, 911 (6th Cir. 2006) (cited at Pet. 22) (Martin, J., joined by Daughtrey, Moore, Cole, and Clay, JJ., dissenting from denial of rehearing *en banc*) (AEDPA relegates "*[f]ederal judges*" to "spectators with 'no adjudicatory function to perform'") (emphasis added), *cert. denied*, 127 S. Ct. 929 (2008); *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1274 (11th Cir. 2005) (cited at Pet. 22) (Birch, J. concurring in denial of rehearing en banc) (Congress may not "require[] federal courts to exercise *their Article III power 'in a manner repugnant to the text, structure, and traditions of Article III'*") (emphasis added) (citation omitted).

National Coalition held that *Klein* did not bar Congress from prohibiting judicial review of challenges to the decision where to locate the World War II Memorial, even though the effect of the statute was to require dismissal of a pending lawsuit challenging the location decision. 269 F.3d at 1097. The court held that the statute presented no *Klein* problem because, *inter alia*, the statute "amends the applicable substantive law" in a manner that was no less narrow than the statute upheld in *Robertson*. *Id.* Notably, Petitioner does *not* challenge the result or reasoning in *National Coalition*, and instead affirmatively *concedes* that that decision "is perfectly reconcilable with the rule of *Klein*." Pet. 15. Rather, Petitioner only challenges the application of *National Coalition* in the specific context of this case. Pet. 19 (challenging the court of appeals decision "extending *National Coalition*" in this case). Petitioner's factbound challenge to the court of appeals' application of the concededly correct decision in *National Coalition* is not certworthy.

Moreover, Petitioner is wrong in contending that the unpublished decision below will have significant implications for contexts *other* than the one presented here. *This* case presents an effort to raise a *Klein* issue in the context of administrative ratemaking, and that is what this Court would be reviewing if it granted certiorari here. Thus, even if *National Coalition* were in conflict with other circuit decisions in construing *Klein* in the *judicial* context—and it is not—this case simply does not present an appropriate vehicle for resolving any such issue.

Apart from these problems, there is nothing about the D.C. Circuit's application of *National Coalition*

here that conflicts with a decision of any other circuit. In the proceedings below, the Government properly relied upon, *inter alia*, *National Coalition*'s holding that, under *Robertson*, a statute that amends the applicable law may be applied to a pending proceeding even if it sweeps very narrowly and addresses only a specific problem. Ct. of App. Br. of FERC and U.S. at 83-84; *see also National Coalition*, 269 F.3d at 1097.[7] The court of appeals apparently agreed with that argument, because it summarily rejected Petitioner's separation of powers argument as contrary to *National Coalition*. Pet. App. 4a. As explained earlier, the statute in this case *does* amend the applicable law, and the decision here therefore does not extend *National Coalition* in a way that conflicts with a decision of another court of appeals. Petitioner's claimed split is illusory for the further reason that the grab bag of *Klein* cases on which Petitioner relies (most of which arise in the AEDPA context) does not include a single case in which a court *found* a *Klein* violation to have occurred. *Ante*, pp. 22-24. To the extent that Petitioner (wrongly) contends that there are differences in the particular verbal formulations used by different courts in analyzing the meaning of *Klein*, Petitioner has simply failed to show that any such differences have any real-world significance and have led to conflicting results.

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[7] The Government notably also relied on the fact that *Klein* has never been applied in the administrative context. Ct. of App. Br. of FERC and U.S. at 75-80.

II. Petitioner's Rational-Basis Challenge to the Statute Presents No Split of Authority and Is Insubstantial

In a single paragraph, Petitioner briefly contends that section 4412 lacks a rational basis. *See* Pet. 17. Petitioner conspicuously does not contend that there is a split on this issue, but instead makes a wholly factbound argument that Congress lacked a rational basis for applying a different rule to pending TAPS ratemaking proceedings than to proceedings filed after section 4412's effective date. This question is not remotely certworthy. Congress had an ample rational basis for treating the two categories differently. Moreover, Petitioner exaggerates the significance of Congress's distinction between the two situations by mischaracterizing the scope of the rule that applies to after-filed cases (a matter that is currently the subject of dispute before FERC in other proceedings).

1. Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Laws subject to rational basis review "must be upheld ... if there is any reasonably conceivable state of facts that could provide a rational basis" for them. *Id.* As the D.C. Circuit correctly stated below, this standard "is plainly satisfied" here given that "Congress could easily have concluded that limiting the retroactivity of refunds would help provide certainty to parties affected by FERC's decision." Pet. App. 4a; *cf. Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731 (1984) (refusing to second-guess balance of benefits and harms struck by Congress in selecting a statute's effective date, noting "the enactment of retroactive statutes confined to

short and limited periods required by the practicalities of producing national legislation ... is a customary congressional practice"); *Johnson v. Arizona*, 462 F.2d 1352, 1354 (9th Cir. 1972) (changes in the law may be applied "retroactively" or "limitedly retroactively" so long as the application has "some rational basis, announced with reasonable precision").

In enacting section 4412, Congress rationally concluded that the imposition of retroactive monetary awards all the way back to 1993 would disturb and dislocate the financial interests and activities of refiners and shippers, particularly where (as here) the administrative proceedings have lasted nearly twenty years because of FERC's repeated errors. *See* 151 Cong. Rec. S3752 (daily ed. Apr. 15, 2005) (statement of Sen. Murkowski) (noting with respect to proposed act that refineries "have no way to make rational business decisions when the value of their products can be determined retroactively long after they can protect themselves for perceived mistakes in FERC-approved valuation methodologies"). Further, Congress legitimately could have concluded that such protections were necessary given the unique nature of TAPS. *See Plaut*, 514 U.S. at 239 n.9 ("Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid ....").

2. Moreover, Petitioner's argument rests on a mistaken premise: Petitioner misapprehends the import of Congress's distinction in section 4412 between pending proceedings and proceedings commenced after the statute's enactment date.

Specifically, Petitioner mischaracterizes the scope of subsection 4412(b)(2), which provides that "[i]n a proceeding commenced after the date of enactment of

this Act, the Commission may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission *imposing quality bank adjustments* in the proceeding." Pub. L. No. 109-59, § 4412(b)(2), 119 Stat. at 1778-79 (emphasis added). This 15-month period exactly coincides with the 15-month limitation on how long FERC can take to issue a final order on a claim related to a Quality Bank adjustment. *See id.*, § 4412(c)(2). Reading the sections *in pari materia* and according to their plain terms, it is clear that, under section 4412(b), retroactive changes are limited to no more than a "15-month period" and that the period is calculated with reference to the "first order" that imposes such "retroactive changes" in "TAPS quality bank adjustments" (a term defined to mean "*monetary* adjustments paid" in connection with the Quality Bank, *id.*, § 4412(a) (emphasis added)).

Petitioner, however, erroneously argues that in "every TAPS Quality Bank proceeding *other than this one*," section 4412(b)(2) "authorize[s] the Commission to order retroactive Quality Bank adjustments back to the original claim, *with no limitation on refunds if (as here) proceedings are extended by repeated judicial vacatur of the Commission's orders*." Pet. 8 (emphases added). Petitioner thus contends that "[w]ere it applied to this case," the "section 4412(b)(2) rule" would have resulted in refunds "ordered back to September 1992 (if otherwise permitted by law)," because the "Commission's first order adjusting valuations was issued on November 30, 1993." Pet. 14. Petitioner therefore argues that, if section 4412(b)(2) were applicable here, it would have allowed FERC,

when the agency *first* imposed retroactive changes in quality bank adjustments in October 2005, to impose more than *twelve years* of retroactive payments. This argument ignores the statutory text, which limits the term of possible retroactivity to a "15-month period" and fixes the start of that period as the date such retroactive changes are first ordered. Pub. L. No. 109-59, § 4412(b)(2). Indeed, 15 months prior to October 2005 would produce a retroactivity period that is *less* favorable than the one Petitioner obtained below under section 4412(b)(1).

Notably, the meaning of subsection 4412(b)(2) is currently the subject of a separate proceeding currently pending before FERC. *See* Protest of Flint Hills Resources Alaska LLC to Compliance Filing of the TAPS Carriers, Docket No. OR06-10-000 (FERC), dated April 17, 2008, at 2-5. That Petitioner's equal protection and due process arguments rest on a debatable and unsettled legal premise provides yet another reason to deny review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

November 2008

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IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION FOR WILLIAMS ALASKA PETROLEUM INC.

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QUESTION PRESENTED

Whether Congress violates the separation of powers when it amends existing law in a statute that establishes one legal standard for an administrative agency to apply in pending cases and a different legal standard for the agency to apply in subsequently filed cases.

RULE 29.6 STATEMENT

Williams Alaska Petroleum Inc. is a wholly-owned subsidiary of Williams Express, Inc., a non-public entity, which in turn is owned by The Williams Companies, Inc. The Williams Companies, Inc. is the only publicly traded company that owns a ten percent or greater interest in Williams Alaska Petroleum Inc.

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BRIEF IN OPPOSITION FOR WILLIAMS ALASKA PETROLEUM INC.

Respondent Williams Alaska Petroleum Inc. ("Williams") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Exxon Mobil Corporation.

OPINIONS BELOW

The unpublished opinion of the court of appeals is reported at 268 F. App'x 7. Pet. App. 1a. The underlying opinions of the Federal Energy Regulatory Commission ("FERC") are published at 113 F.E.R.C. ¶ 61,062 (Pet. App. 89a), 114 F.E.R.C. ¶ 61,323 (Pet. App. 28a), and 115 F.E.R.C. ¶ 61,287 (Pet. App. 8a).

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner asks this Court to break new ground by granting review in this case and holding that the Constitution prohibits Congress from amending existing law in a statute that establishes different legal standards for pending and subsequently filed cases. Doing so would require this Court to overrule a settled line of precedent establishing that the separation of powers does not prevent Congress from "'amend[ing] applicable law'" governing pending cases. *Miller v. French*, 530 U.S. 327, 349 (2000) (quoting *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)). Petitioner provides no conceivable basis for revisiting this longstanding line of authority—let alone, the "special justification" that would be required to rewrite constitutional law in

this area. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

The petition for a writ of certiorari should be denied.

1. The Trans Alaska Pipeline System ("TAPS") is the sole means of shipping petroleum produced on the North Slope of Alaska to the port of Valdez, Alaska. *See generally Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286 (D.C. Cir. 2000); *OXY USA, Inc. v. FERC*, 64 F.3d 679 (D.C. Cir. 1995). TAPS commingles the various shippers' petroleum in a single pipeline. *OXY USA, Inc.*, 64 F.3d at 684. Due to commingling and to refiners' removal of parts of certain petroleum components before the petroleum reaches Valdez, the petroleum that shippers receive at the Valdez terminus is not necessarily of the same quality as the petroleum they tender into the TAPS. *Id.* To account for this commingling, FERC approved an accounting arrangement known as the TAPS Quality Bank that makes monetary adjustments among TAPS users. *Id.* The TAPS Quality Bank imposes an assessment on shippers of relatively lower-quality petroleum who benefit from commingling, as well as on refiners who remove portions of higher-valued components of petroleum from the pipeline, and distributes the proceeds to shippers of higher-quality petroleum who receive a lower-quality product when the petroleum arrives at Valdez. *Id.*

2. For more than fifteen years, petroleum shippers and refiners have been engaged in litigation before FERC regarding the valuation that the TAPS Quality Bank should apply to various petroleum products. In 1993, FERC approved a new distillation-based valuation methodology for the TAPS Quality Bank to apply on a going-forward basis. 65

F.E.R.C. ¶ 61,277 (1993). The D.C. Circuit substantially upheld this valuation methodology but remanded the case to FERC to reconsider the methodology to be applied to certain of the petroleum components. *OXY USA*, 64 F.3d at 701. On remand, FERC amended these valuations, which the D.C. Circuit subsequently upheld in large part. *Exxon Co., USA v. FERC*, 182 F.3d 30, 34 (D.C. Cir. 1999). In that 1999 decision, the D.C. Circuit held, for the first time, that FERC should consider applying these amended valuations retroactively back to 1993. *Id.* at 50.

A FERC Administrative Law Judge ("ALJ") thereafter altered his previous position that retroactive adjustments would not be permitted. The ALJ's order applied the amended valuation for the Resid component of petroleum to all TAPS petroleum shipments dating back to December 1, 1993, and required the payment of refunds to shippers who had been underpaid during that period. Pet. App. 165a.

While the ALJ's decision was pending on review before FERC, Congress enacted the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), Pub. L. No. 109-59, 119 Stat. 1144 (2005). Section 4412 of SAFETEA-LU amended the law governing refunds in TAPS Quality Bank proceedings. Section 4412(b)(1) provides that, "[i]n a proceeding commenced before the date of enactment of this Act," FERC "may not order retroactive changes in TAPS quality bank adjustments for any period before February 1, 2000." 119 Stat. at 1778-79. Section 4412(b)(2) provides that, in subsequently filed cases, FERC "may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the ear-

liest date of the first order of the [FERC] imposing quality bank adjustments in the proceeding." *Id.* at 1779.

Applying the new legal standard established by Section 4412(b)(1), FERC ordered that petitioner and other shippers were entitled to refunds of certain TAPS Quality Bank valuations dating back to February 1, 2000. Pet. App. 191a-92a.

3. Petitioner and several other petroleum shippers filed petitions for review of FERC's order in the D.C. Circuit. Among other objections to the order, petitioner argued that SAFETEA-LU violated the separation of powers because it "reversed the administrative law judge's decision . . . to make FERC's [valuations] retroactive to 1993." Pet. App. 4a.

The D.C. Circuit denied the petitions for review. Pet. App. 1a. In so doing, the court of appeals rejected petitioner's constitutional challenge to SAFETEA-LU based on its earlier decision in *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001), *cert. denied*, 537 U.S. 813 (2002). Pet. App. 4a. That decision had held that, under this Court's reasoning in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), Congress does not violate the separation of powers when it "amends the applicable substantive law" governing pending proceedings. *Nat'l Coalition*, 269 F.3d at 1097.

REASONS FOR DENYING THE PETITION

The D.C. Circuit's decision upholding Section 4412 of SAFETEA-LU is consistent with this Court's settled separation-of-powers jurisprudence. Those decisions make clear that, although Congress may not "prescribe rules of decision to the Judicial Department" (*United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871)), this "prohibition does not take hold

when Congress amend[s] applicable law." *Miller v. French*, 530 U.S. 327, 349 (2000) (alteration in original; internal quotation marks omitted). Because Section 4412 amended the law governing refunds in pending and subsequently filed TAPS Quality Bank proceedings, the D.C. Circuit's decision rejecting petitioner's constitutional challenge falls squarely within this established separation-of-powers framework. Indeed, the court of appeals' decision was *compelled* by this Court's decision in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), which held that Congress does not violate the separation of powers when it enacts a statute that establishes one legal standard for pending cases and a different legal standard for subsequently filed cases.

Petitioner offers no plausible basis for reconsidering this settled line of authority, which has been consistently and uniformly applied by the lower courts. Moreover, even if there were a reason to revisit the *Klein* line of decisions, this case would be a singularly poor vehicle for doing so because, in rejecting petitioner's arguments, neither FERC nor the D.C. Circuit apparently deemed it necessary to authoritatively construe the newly enacted TAPS refund provisions that petitioner challenges. The radical reworking of separation-of-powers principles sought by petitioner should not be considered against this unsettled statutory backdrop.

I. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND EVERY OTHER CIRCUIT.

Petitioner contends that the D.C. Circuit's decision rejecting its constitutional challenge to Section 4412 of SAFETEA-LU conflicts with *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), and its progeny,

as well as with lower-court decisions interpreting the *Klein* line of cases. Petitioner's purported conflict is illusory.

A. The Decision Below Correctly Applies The *Klein* Line Of Cases.

1. In *Klein*, the Court held that Congress violated the separation of powers when it enacted a statute that provided that a presidential pardon represented conclusive proof of a claimant's disloyalty in suits seeking to recover the value of property seized during the Civil War. 80 U.S. (13 Wall.) at 146. The claimant in *Klein* had prevailed in the Court of Claims under previously applicable law, which provided that a pardon satisfied the claimant's burden of proving that he had not aided the Confederacy, and this Court concluded that the statute that purported to change that result was unconstitutional because it impermissibly "prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it." *Id.*

This Court has subsequently explained that, "[w]hatever the precise scope of *Klein*, . . . its prohibition does not take hold when Congress amend[s] applicable law." *Miller v. French*, 530 U.S. 327, 349 (2000) (alterations in original; internal quotation marks omitted). In *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), for example, the Court rejected a separation-of-powers challenge to a statute that deemed compliance with newly promulgated restrictions on forest harvesting sufficient to establish compliance with the laws at issue in two pending suits challenging harvesting of the spotted owl's habitat. *Id.* at 441. The Court held that the newly enacted statute "compelled changes in law, not findings or results under old law," and thus did not im-

plicate *Klein*'s prohibition on congressional "rules of decision" in pending cases. *Id.* at 438.

Similarly, in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the Court rejected a *Klein*-based challenge to a statute that retroactively altered the statute of limitations in cases pending at the time this Court decided *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), which had held that the statute of limitations for federal securities fraud claims is one year after discovery of the facts constituting the violation and three years after the violation. *Plaut*, 514 U.S. at 218. The newly enacted statute provided for the application of the pre-*Lampf* statute of limitations in cases pending at the time *Lampf* was decided (even if the case had already been closed) and the application of the *Lampf* standard in subsequently filed cases. *Id.* at 214. Notwithstanding Congress's retroactive change in the law applicable in pending (and already closed cases), the Court held that the statute did not, for that reason, violate the separation of powers because it "indisputably . . . set out substantive legal standards for the Judiciary to apply, and in that sense change[d] the law (even if solely retroactively)." *Id.* at 218; *see also Miller*, 530 U.S. at 349 (rejecting a *Klein*-based challenge to a statute that established new legal standards to be applied to pending injunctions regarding prison conditions).[1]

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[1] Although the Court in *Plaut* concluded that the statute was consistent with the rule articulated in *Klein*, the Court nevertheless held that it contravened Article III of the Constitution by "retroactively commanding the federal courts to reopen final judgments." *Plaut*, 514 U.S. at 219. SAFETEA-LU, in contrast, did not require FERC to reopen TAPS Quality Bank proceedings that were final at the time of the statute's enactment. In-

The D.C. Circuit's decision upholding Section 4412 of SAFETEA-LU fits squarely within the *Klein* line of cases. Section 4412(b) established one standard for refunds of TAPS Quality Bank adjustments in cases pending at the time of its enactment and another standard for refunds in subsequently filed cases. Relying on its earlier decision in *National Coalition to Save our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001), *cert. denied*, 537 U.S. 813 (2002), the D.C. Circuit rejected petitioner's separation-of-powers challenge to Section 4412 because the statute "amends the applicable substantive law" governing refunds in TAPS Quality Bank proceedings. *Id.* at 1097; *see also* Pet. App. 4a. This result is compelled by *Plaut*, which rejected an identical separation-of-powers challenge to a statute that retroactively amended the statute of limitations for cases pending at the time *Lampf* was decided while leaving undisturbed a different statute of limitations for cases filed after *Lampf*. As this Court has consistently reiterated, *Klein*'s separation-of-powers restrictions are inapplicable to such "amend[ments]" of "applicable law." *Miller*, 530 U.S. at 349.[2]

[Footnote continued from previous page]

deed, when SAFETEA-LU was enacted, there had not even been a final agency adjudication in this case awarding retroactive Quality Bank adjustments back to 1993. There had only been an *initial* decision by an ALJ, which was neither final nor binding because the parties had filed exceptions to it with FERC. *Cf. Robertson*, 503 U.S. at 432 (rejecting a separation-of-powers challenge to a statute even though it required a district court to vacate a preliminary injunction that it had already entered).

[2] The Court also substantially clarified *Klein*'s reach in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), which explained that the statute in *Klein* was "unconstitutional

2. Petitioner concedes, as it must, that "the prohibition of *Klein* does not take hold when Congress amends applicable law." Pet. 12 (internal quotation marks omitted). Petitioner instead contends that "Section 4412(b)(1)"—which redefines the scope of available refunds in pending TAPS Quality Bank proceedings—"does not amend applicable law." *Id.* at 14. According to petitioner, only Section 4412(b)(2)—which governs refunds in subsequently filed TAPS Quality Bank proceedings—constitutes an amendment of the law. *Id.* But petitioner itself acknowledges that "Section 4412 *create[d] two rules* relating to [FERC's] power to order TAPS Quality Bank refunds" (*id.* at 8 (emphasis added))—one governing pending proceedings and one governing future proceedings. Those rules superseded earlier law, which the D.C. Circuit had construed to allow retroactive application of TAPS Quality Bank adjustments back to 1993. *See Exxon*, 182 F.3d at 50.

Nor does petitioner take issue with the well-established proposition that "Congress may intervene to change the results in pending cases." Pet. 13; *see also Plaut*, 514 U.S. at 226 ("When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on

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in two respects: First, it prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor." *Id.* at 404. Second, the statute was "liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive." *Id.* at 404-05 (internal quotation marks omitted). Section 4412 of SAFETEA-LU, in contrast, neither decides a case in the government's favor nor restricts the President's constitutional authority.

appeal that were rendered before the law was enacted, and must alter the outcome accordingly.") (citing *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801)). Petitioner instead rests its entire argument on the fact that there was only one TAPS Quality Bank proceeding pending at the time that Congress enacted SAFETEA-LU. According to petitioner, Section 4412(b)(1) therefore "impermissibly directs results in a single pending adjudication under old law." Pet. 14.

Petitioner's argument is completely at odds with its own recognition that "Congress may always legislate regarding 'a legitimate class of one.'" Pet. 16 (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 472 (1977) (emphasis omitted)). In *Nixon*, the Court upheld a statute directing the Administrator of the General Services Administration to take custody of former President Nixon's presidential papers and audio recordings. *Id.* at 484. The Court rejected President Nixon's argument that Congress had impermissibly singled him out for adverse treatment, explaining that President Nixon's argument would have "establishe[d] that the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality." *Id.* at 469-70. This "view," the Court continued, "would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality." *Id.* at 470. Because the papers of prior Presidents were already housed in presidential libraries, President Nixon "constituted a legitimate class of one" for purposes of federal legislative action. *Id.* at 472.

This case similarly involves a "legitimate class of one." Just as it was permissible for Congress to enact legislation that reached the only former President whose papers were not housed in a presidential library, there was no constitutional impediment to Congress's enactment of a legal standard for pending TAPS Quality Bank proceedings that reached the only such proceeding pending at the time of enactment. *See Plaut*, 514 U.S. at 239 n.9 ("Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid . . . .").

Petitioner therefore fails in its effort to manufacture a conflict between the decision below and this Court's precedent. Nothing in *Klein* or its progeny prohibits Congress from enacting a statute that establishes one rule of law for pending cases and a different rule of law for subsequently filed cases—even where there is only one such case pending at the time of enactment. The D.C. Circuit's decision upholding Section 4412 is fully consistent with—and compelled by—that line of authority.[3]

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[3] Moreover, as explained at length in the brief in opposition of Petro Star Inc., far from seeking a "straightforward" application of "the rule of *Klein*" (Pet. 14), petitioner is asking this Court to extend *Klein*'s prohibition on statutes that "prescribe rules of decision to the Judicial Department" to statutes that establish "rules of decision" for proceedings before FERC and other administrative agencies. But petitioner cites no case where *Klein* has been applied to a statute governing agency proceedings and provides no basis for transplanting the unique separation-of-powers considerations that govern congressional interference with Article III courts to the agency setting. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 568 (1962) (plurality opinion) ("Surely no such concern would have been manifested [in *Klein*] if it had not been thought that the Court of Claims was invested with judicial power.").

B. There Is No Conflict In The Lower Courts Regarding The *Klein* Line of Cases.

Petitioner's attempt to generate a conflict between the decision below and the decisions of other lower courts is equally unavailing.

Tellingly, petitioner does not cite even a single lower-court decision invalidating a statute under the *Klein* line of cases. Pet. 19-20. And none of the cases rejecting *Klein*-based challenges cited by petitioner endorses a reading of *Klein* that would prohibit Congress from amending the law through a statute that established one legal standard for pending cases and a different legal standard for subsequent cases. Those decisions merely reiterate the straightforward proposition that "Congress may not predetermine the results in any given case." *Crater v. Galaza*, 491 F.3d 1119, 1128 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2961 (2008); *see also Green v. French*, 143 F.3d 865, 874 (4th Cir. 1998) (Congress may not "mandate[ ] a particular result in any pending case"), *abrogated on other grounds by Williams v. Taylor*, 529 U.S. 362 (2000).[4]

Section 4412(b)(1) of SAFETEA-LU does not "predetermine the results" in any TAPS Quality Bank proceeding. It simply establishes a new substantive legal standard that authorizes FERC to order refunds as far back as February 1, 2000, if FERC

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[4] *Shawnee Tribe v. United States*, 423 F.3d 1204, 1217-18 (10th Cir. 2005) ("Congress cannot dictate findings or command specific results in pending cases."); *Lindh v. Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (en banc) (Congress cannot "tell courts how to decide a particular case"), *rev'd on other grounds*, 521 U.S. 320 (1997).

determines in a pending TAPS Quality Bank proceeding that such relief is warranted.

Other lower courts agree with the D.C. Circuit that such amendments to applicable law do not violate the separation of powers. *See Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1171 (10th Cir. 2004) ("Because . . . the 706 Rider did 'amend[ ] applicable law,' the *Klein* principle does not apply here."); *Nichols v. Hopper*, 173 F.3d 820, 823 (11th Cir. 1999) (no separation of powers violation where "Congress has enacted new standards, but has left to the courts the judicial functions of applying those standards"); *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 187 (3d Cir. 1999) (same).

Because the D.C. Circuit's rejection of petitioner's constitutional challenge is consistent with the settled law of every other circuit that has addressed the issue, there is no basis for this Court to accept petitioner's invitation to revisit the *Klein* line of cases.[5]

II. THIS CASE IS A POOR VEHICLE FOR REEXAMINING *KLEIN* AND ITS PROGENY.

Petitioner asks this Court to grant review in order to reconsider a more than century-old line of authority spanning from *Klein* to *Miller v. French*, but offers no plausible basis for the Court to reexamine

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[5] Petitioner also contends in passing that Section 4412(b)(1) lacks "a rational basis." Pet. 17. Because petitioner does not include this rational basis challenge in its question presented, the Court need not consider it. In any event, that argument does not warrant this Court's review because, as the D.C. Circuit explained, "Congress could easily have concluded that limiting the retroactivity of refunds would help provide certainty to parties affected by FERC's decision." Pet. App. 4a.

those decisions. Indeed, at least three times in the last two decades—in *Plaut*, *Robertson*, and *Miller*—the Court has reaffirmed that Congress does not violate the separation of powers when it amends existing law governing pending cases. The D.C. Circuit's decision fits squarely within that line of authority.

Even if the Court were inclined to undertake the far-reaching reexamination of its precedent urged by petitioner, this case is a particularly poor vehicle for doing so because petitioner's constitutional challenge is inextricably intertwined with unsettled questions of statutory construction that, in the first instance, require resolution by FERC. Petitioner premises its constitutional challenge to Section 4412(b)(1) on the ground that "the rule of section 4412(b)(2)"—which governs TAPS Quality Bank proceedings commenced after the enactment of SAFETEA-LU—"would allow full refunds to ExxonMobil back to 1993" if applied in this case. Pet. 14. But neither FERC nor the D.C. Circuit has addressed this issue of statutory construction. Indeed, the D.C. Circuit saw no need to do so in this case, and instead rejected petitioner's separation-of-powers argument on the basis of its previous decision in *Save our Mall*.

Properly construed, however, the application of Section 4412(b)(2) in this case would actually have provided petitioner with a *shorter* refund period than Section 4412(b)(1). Section 4412(b)(2) provides that FERC "may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the [FERC] imposing quality bank adjustments in the proceeding." 119 Stat. at 1779. In other words, as Williams argued below, the provision imposes a limitation of no more than a total of fifteen months of retroactive adjust-

ments regardless of when the triggering order is issued.

Petitioner contends that FERC's "first order adjusting valuations was issued on November 30, 1993." Pet. 14. In fact, that 1993 decision was prospective only and thus ordered *no* refunds. *See OXY USA v. FERC*, 64 F.3d 679, 699 (D.C. Cir. 1995) ("FERC properly determined that it lacked the authority to apply the new methodology retroactively"); *see also* 65 F.E.R.C. ¶ 61,277 (1993). Indeed, it was not until six years later that the D.C. Circuit required FERC to consider ordering refunds back to 1993. *See Exxon*, 182 F.3d at 50 ("FERC abused its discretion when it failed without adequate explanation to make the revaluation and concomitant Quality Bank adjustments retroactive to 1993"). Accordingly, "the first order of the [FERC] imposing quality bank adjustments" was the ALJ's 2005 decision, which, pursuant to the D.C. Circuit's instructions in *Exxon*, ordered refunds of Quality Bank Resid component adjustments back to 1993. *See* Pet. App. 165a-92a.[6]

Petitioner therefore received a larger refund of TAPS Quality Bank adjustments under Section 4412(b)(1) than it would have if the refund rule established in Section 4412(b)(2) had been applied to the pending proceeding. Under Section 4412(b)(2), petitioner would only have been entitled to a refund for the fifteen-month period preceding FERC's 2005 refund order. Under Section 4412(b)(1), in contrast,

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[6] The ALJ's decision was nonfinal and subject to review by FERC upon request of the parties. FERC itself never ordered refunds arising from the Resid component valuation back to 1993, either before or after the enactment of SAFETEA-LU.

petitioner is entitled to a refund back to February 1, 2000.

The fact that Section 4412(b)(1) provides petitioner with more favorable treatment than it would have received under the refund rule applicable to subsequently filed TAPS Quality Bank proceedings eviscerates petitioner's argument that Congress violated the separation of powers by singling out this pending proceeding for disparate treatment. At a minimum, the inconsistent interpretations of Section 4412(b)(1) advanced by petitioner and respondents—and the apparent absence of a need for FERC or the D.C. Circuit to issue an authoritative construction of that provision in order to reject petitioner's arguments—militate strongly against using this case to undertake the far-reaching reconsideration of settled precedent urged by petitioner.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 08-212

In the Supreme Court of the United States

EXXON MOBIL CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Section 4412(b)(1) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1778 (2005), is unconstitutional under *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872).

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unreported. The pertinent opinions of the Federal Energy Regulatory Commission (Pet. App. 8a-199a) are reported at 113 F.E.R.C. ¶ 61,062, 114 F.E.R.C. ¶ 61,323, and 115 F.E.R.C. ¶ 61,287.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2008. A petition for rehearing was denied on May 20, 2008. The petition for a writ of certiorari was filed on August 18, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

Section 4412(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, 119 Stat. 1778-1779 (2005), provides:

> **(1) IN GENERAL.—**
>
> In a proceeding commenced before the date of enactment of this Act, the Federal Energy Regulatory Commission may not order retroactive changes in TAPS quality bank adjustments for any period before February 1, 2000.
>
> **(2) PROCEEDINGS COMMENCED AFTER THE DATE OF ENACTMENT.—**
>
> In a proceeding commenced after the date of enactment of this Act, the Commission may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding.

STATEMENT

1. The Trans Alaska Pipeline System (TAPS) transports crude oil from the North Slope to the Gulf of Alaska. The pipeline is used by multiple shippers. The composition of the crude oil streams introduced by the shippers into the pipeline varies with the source of the streams, and those variations in turn affect the value of the oil being shipped. Because each shipper's stream of oil is intermingled in the pipeline, the composition (and

hence value) of the oil introduced by a shipper at one end of the pipeline may be higher or lower than the value of the blended oil that the shipper withdraws at the other end. See generally *OXY USA, Inc.* v. *FERC*, 64 F.3d 679, 684-685 (D.C. Cir. 1995).

To account for these variations in value, the carriers that operate the pipeline employ a quality bank. A quality bank is an accounting mechanism in which each shipper's oil stream is assigned a value based on its composition, and shippers with lower-value streams pay quality-bank adjustments that are used to compensate shippers with higher-value streams. *OXY USA*, 64 F.3d at 684.

The rates charged to TAPS shippers, including quality-bank adjustments, are regulated by the Federal Energy Regulatory Commission (Commission) pursuant to the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), as amended.[1] In 1984, the Commission approved the use of a so-called gravity methodology to determine the value of shippers' oil streams and calculate TAPS quality-bank adjustments. 29 F.E.R.C. ¶ 61,123. Five

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[1] The Interstate Commerce Act, which had been codified in Title 49 of the U.S. Code, was largely repealed by Congress when Congress enacted Title 49 (including provisions derived from the Interstate Commerce Act) as positive law in 1978. However, Congress did not repeal the Act's provisions to the extent that they involved functions and authority of the Interstate Commerce Commission related to the "transportation of oil by pipeline." See Act of Oct. 17, 1978, Pub. L. No. 95-473, § 4(c), 92 Stat. 1470; see also *Frontier Pipeline Co.* v. *FERC*, 452 F.3d 774, 776 (D.C. Cir. 2006); cf. 49 U.S.C. 1-27 (1976 & Supp. I 1977) (codifying Part I of the Interstate Commerce Act, as amended, which governs, *inter alia*, the transportation of oil by pipeline) (reproduced at 49 U.S.C. App. §§ 1-27, at 521-571 (1988)). The Federal Energy Regulatory Commission now exercises that authority to the extent its relates to the establishment of pipeline rates and charges. 49 U.S.C. 60502.

years later, the Commission initiated an investigation to determine whether the gravity methodology remained just and reasonable. In doing so, the Commission specified that "any change in methodology should be effected prospectively." 49 F.E.R.C. ¶ 61,349, at 62,264-62,265 (1989). The Commission conducted its review pursuant to Section 13(2) of the Interstate Commerce Act, which authorizes the Commission to "institute an inquiry * * * concerning * * * any of the provisions of [part I of the Act]," but disallows the Commission from issuing "orders for the payment of money." 49 U.S.C. 13(2) (1976); cf. 49 U.S.C. 27 (1976).

In 1993, the Commission determined that the gravity methodology was no longer just and reasonable and approved a proposed settlement adopting a different methodology, known as a distillation methodology, that divides crude oil into "cuts" based on the temperatures at which each cut is distilled and assigns an economic value to each cut. 65 F.E.R.C. ¶ 61,277 (1993). In keeping with its 1989 decision, the Commission made the change in methodology prospective. The Commission reasoned that because the gravity methodology had been approved by the Commission, the TAPS carriers were justified in relying on it until it was changed, and giving retroactive effect to the change in methodology would violate the filed-rate doctrine. *Id.* at 62,292.

In 1995, the D.C. Circuit affirmed the Commission's adoption of the distillation methodology. *OXY USA*, 64 F.3d at 689-692. The court of appeals also sustained the Commission's determination "that it lacked the authority to apply the new methodology retroactively." *Id.* at 699. The court reasoned that the Commission lacked statutory authority to order retroactive adjustments under Section 13(2) of the Interstate Commerce Act and

that, because shippers were not on notice that a change in the methodology was possible, a retroactive change would have violated the principles underlying the filed-rate doctrine. *Id.* at 699-700.

Although the court of appeals sustained the Commission's adoption of the distillation methodology, the court remanded to the Commission to recalculate the value of several cuts, including the so-called resid cut. In 1997, the Commission approved a settlement regarding the valuation of resid and other cuts. 81 F.E.R.C. ¶ 61,319. Once again, the Commission made the resulting changes prospective. *Id.* at 62,467.

In 1999, the D.C. Circuit issued a decision that sustained the Commission's approval of most of the terms of the 1997 settlement, but it remanded for further proceedings regarding the valuation of the resid cut. *Exxon Co.* v. *FERC*, 182 F.3d 30. In addition, the court of appeals held that the Commission had discretion to give retroactive effect to the changes in the quality-bank adjustments. *Id.* at 49-50. For the first time in this proceeding, the court adopted a "strong equitable presumption in favor of retroactivity that would make the parties whole," and held that the filed-rate doctrine was not an obstacle to retroactive adjustments "because all of the TAPS shippers were on notice as of 1993 that the valuations were contested." *Id.* at 49. The court did not hold that retroactivity was required, but ruled that the Commission had abused its discretion by not providing an adequate explanation of why it chose to make the changes prospective. *Id.* at 49-50.

2. The remand proceeding was still pending before the Commission when, in August 2005, Congress enacted the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU),

Pub. L. No. 109-59, 119 Stat. 1144. Section 4412 of SAFETEA-LU places statutory deadlines and time limits on administrative proceedings involving TAPS quality-bank adjustments. 119 Stat. 1778.

Section 4412(c)(1) provides that TAPS quality-bank claims must be filed with the Commission no later than two years after they arise. 119 Stat. 1779. Section 4412(c)(2) requires that the Commission issue a final order with respect to any such claim within 15 months after the claim is filed. *Ibid.* Finally, Section 4412(b) places statutory limits on the length of any retroactive changes in TAPS quality-bank adjustments ordered by the Commission. For proceedings pending at the time of SAFETEA-LU's enactment, the Commission may not order retroactive changes "for any period before February 1, 2000." 119 Stat. 1778 (Section 4412(b)(1)). For proceedings commenced after the enactment of SAFETEA-LU, retroactive changes are limited to "the 15-month period immediately preceding the earliest date of the first order of the [Commission] imposing quality bank adjustments in the proceeding." 119 Stat. 1778-1779 (Section 4412(b)(2)).

3. The Commission issued its remand decision in October 2005. Pet. App. 89a. Among other things, the Commission adopted a new formula for valuing the resid cut. The Commission ordered that the new resid valuation should be applied retroactively to February 1, 2000, the cutoff date established by Section 4412(b)(1). *Id.* at 166a-167a. The Commission noted that the parties had presented a variety of "equitable and other arguments" against retroactivity, but reasoned that since Section 4412(b)(1) now limits the permissible duration of the refund period, "those arguments no longer have the

same validity that they might have had if the refund period was back to December 1, 1993." *Ibid.*

4. Petitioner and other parties filed petitions for review in the D.C. Circuit, raising a variety of challenges to the Commission's latest decision. Petitioner contended, *inter alia*, that Section 4412(b)(1) is unconstitutional under *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). As discussed further below, *Klein* invalidated a Reconstruction-era federal statute that required courts to treat the acceptance of a Presidential pardon as conclusive proof of disloyalty for purposes of suits seeking recovery of property seized during the Civil War, and that purported to divest this Court and the Court of Claims of jurisdiction over any suits predicated on such pardons. Petitioner asserted that Section 4412(b)(1) is unconstitutional under *Klein* and that the Commission therefore should have awarded refunds without regard to the statutory time limit.

The court of appeals rejected all of the challenges to the Commission's decision and denied the petitions for review in a brief, unpublished judgment order. Pet. App. 1a-7a. The panel disposed of petitioner's *Klein* argument in a single sentence:

> As to petitioners' separation of powers argument, any claim that Congress's decision here unconstitutionally exercised judicial power is foreclosed by our decision in *National Coalition to Save Our Mall* v. *Norton*, 269 F.3d 1092 (D.C. Cir. 2001).

Id. at 4a. The court's decision not to publish the order signifies that "the panel sees no precedential value in that disposition" and that the order does not "alter[], modif[y], or significantly clarif[y] a rule of law previ-

ously announced by the court." D.C. Cir. R. 36(a)(2)(B) and (c)(2).

ARGUMENT

Petitioner contends that Section 4412(b)(1) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, 119 Stat. 1778 (2005), impacts ongoing administrative proceedings before a federal agency in a manner that is unconstitutional under *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). Pet. 11-23. That claim is without merit. The unpublished order of the court of appeals is correct and does not conflict with *Klein*, any other decision of this Court, or any decision of any other court of appeals. No further review is warranted.

1. *Klein* arose out of efforts to recover property seized by Union military authorities during the Civil War. Under the Abandoned Property Collection Act, ch. 120, 12 Stat. 820 (1863), a person whose property had been seized by the military could recover its value in the Court of Claims upon a showing that, *inter alia*, the claimant "ha[d] never given any aid or comfort to the present rebellion." § 3, 12 Stat. 821. In *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 542-543 (1870), this Court held that receipt of a Presidential pardon was conclusive proof of loyalty and entitled the recipient to return of his property. In response, Congress enacted a statute providing that no Presidential pardon should be admissible as proof of loyalty; that acceptance of a pardon without written protest or disclaimer should be treated by the courts as conclusive evidence of the claimant's disloyalty; and that the Court of Claims and this Court were required to dismiss for want of jurisdiction any pending claims for recovery of property based on a

Presidential pardon. Act of July 12, 1870, ch. 250, 16 Stat. 235; see *Klein*, 80 U.S. (13 Wall.) at 132-134, 143-144.

At the time that the legislation was enacted, the claimant in *Klein* had already obtained a judgment in his favor from the Court of Claims on the basis of a Presidential pardon, and an appeal from that judgment was pending before this Court. Acting on the basis of the intervening legislation, the United States moved to dismiss the appeal and to direct the Court of Claims to dismiss the underlying suit. This Court denied the motion on the ground that the legislation was unconstitutional and proceeded to affirm the lower court's judgment on the merits. 80 U.S. (13 Wall.) at 142-148.

The Court held that the legislation impermissibly "impair[s] the effect of a pardon, and thus infring[es] the constitutional power of the Executive." *Klein*, 80 U.S. (13 Wall.) at 147. In addition, the Court concluded that "Congress has inadvertently passed the limit which separates the legislative from the judicial power." *Ibid.* The Court observed that the legislation in question "prescribe[d] a rule for the decision of a cause in a particular way" and could not be sustained "without allowing one party to the controversy to decide it in its own favor." *Id.* at 146. The Court acknowledged that Congress has the authority under Article III to make exceptions to the appellate jurisdiction otherwise conferred on the Court, but it asked: "Can [Congress] prescribe a rule in conformity with which the court must deny to itself the [appellate] jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This questions seems to us to answer itself." *Id.* at 146-147.

This Court has elaborated on the meaning of *Klein* in subsequent decisions. In *United States* v. *Sioux Nation*, 448 U.S. 371 (1980), the Court explained that the statute in *Klein* was unconstitutional "in two respects." *Id.* at 404. "First, [the statute] prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor." *Ibid.* "Second, the rule prescribed by the proviso '[was] also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive.'" *Id.* at 404-405 (citation omitted). As the Court explained, "the fact that Congress was attempting to decide the controversy at issue in the Government's own favor" was "of obvious importance to the *Klein* holding." *Id.* at 405. In addition, despite *Klein*'s reference to legislation "prescrib-[ing] a rule of decision in a case pending before the courts" (80 U.S. (13 Wall.) at 146), "later decisions have made clear that [*Klein*'s] prohibition does not take hold when Congress 'amend[s] applicable law,'" as opposed to directing the disposition of cases under existing law. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)).

Section 4412(b)(1) of SAFETEA-LU does not have any of the attributes that this Court found to be constitutionally problematic in *Klein* and identified as such in subsequent decisions. First, unlike the statute in *Klein*, which infringed on the pardon power, Section 4412(b)(1) does not trench on any of the President's powers under Article II. Second, Section 4412(b)(1) does not—indeed, cannot—violate "the limit which separates the legislative from the judicial power" (80 U.S. (13 Wall.) at 147), because it regulates the rate-setting authority of an Ex-

ecutive Branch agency, not the judicial power of an Article III court. Petitioner cites no case, and we know of none, in which *Klein* has been held to limit Congress's powers vis-a-vis administrative agencies.[2] Third, be

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[2] In related contexts, this Court has recognized that the adjudicatory functions of federal agencies are subject to the control of Congress in ways that the "judicial power of the United States" under Article III is not. For example, while separation-of-powers principles prevent Congress from reopening final judgments of Article III courts, this Court has held squarely that Congress is free to reopen final adjudications of federal agencies. Compare *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 381 & n.25 (1940) (private Act of Congress requiring federal agency to reopen final worker's compensation decision does not violate separation-of-powers principles because decision was issued by an agency rather than by a court), with *Plaut*, 514 U.S. at 232 (holding that law requiring federal courts to reopen final judgments violates the separation of powers; distinguishing *Paramino Lumber* and related decisions on the ground that they involved non-Article III adjudicatory bodies and emphasizing that "nothing in our holding today calls [such cases] into question").

Petitioner suggests (at 12) that the Court of Claims was not an Article III court, and hence that *Klein* cannot have rested solely on Article III concerns. But *Klein* itself clearly understood the Court of Claims to be an "inferior court" under Article III. See 80 U.S. (13 Wall.) at 144-145 & n.§ (explaining that "the Court of Claims has exercised all the functions of a court" after Congress repealed a provision that prevented that court from exercising Article III power, and that the Court of Claims in *Klein* "is thus constituted one of those inferior courts which Congress authorizes") (citing *Gordon* v. *United States*, 69 U.S. (2 Wall.) 561 (1865) (disposition)); *United States* v. *Jones*, 119 U.S. 477, 478 (1886) (reporting *Gordon* decision, which holds that the statutory provision that Congress repealed had prevented the Court of Claims from exercising "judicial power" under Article III because, before the repeal, the Court of Claims' resolution of claims did not entitle litigants to payment absent further action by the Secretary of the Treasury); *Gordon* v. *United States*, 117 U.S. 697, 698-699, 704 (1865) (opinion of Taney, C.J.); see also *Plaut*, 514 U.S. at 218 (describing *Klein* as invalidating "legislatio[n] that require[d] federal courts to

cause TAPS quality-bank adjustments involve financial claims by private shippers against each other, rather than claims by or against the federal government, this is not a case in which "Congress [is] attempting to decide the controversy at issue in the Government's own favor." *Sioux Nation*, 448 U.S. at 405. Finally, *Klein* "does not take hold when Congress 'amend[s] applicable law,'" *Plaut*, 514 U.S. at 218 (quoting *Robertson*, 503 U.S. at 441), and that is precisely what Section 4412(b)(1) does: together with Section 4412(b)(2), it alters the law governing "retroactive changes in TAPS quality bank adjustments," 119 Stat. 1778, by placing legislative time limits on the reach of such changes.

2. In disposing of the *Klein* claim in this case, the court of appeals found it sufficient to rely on the court's earlier decision in *National Coalition to Save Our Mall* v. *Norton*, 269 F.3d 1092 (D.C. Cir. 2001). Pet. App. 4a. The plaintiffs in *National Coalition* brought suit to enjoin the construction of the then-proposed World War II Memorial on the National Mall, claiming that various agencies had violated the National Environmental Policy Act and other federal statutes. While the suit was pending, Congress enacted a statute that exempted construction of the memorial from all of the statutes invoked by the plaintiffs and barred judicial review of the agency decisions underlying the construction. *National Coal.*, 269 F.3d at 1093-1094.

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exercise the judicial power in a manner that Article III forbids" by "prescrib[ing] rules of decision to the Judicial Department" in pending cases) (citation omitted); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568-569 (1962) (plurality opinion) ("[s]urely no such concern would have been manifested [in *Klein*] if it had not been thought that the Court of Claims was invested with judicial power" under Article III).

The court of appeals rejected the plaintiffs' challenge to the constitutionality of the legislation under *Klein*. 269 F.3d at 1095-1097. In so doing, the court held that the law was not unconstitutional under *Klein* merely because it was aimed at one pending suit involving a single legal controversy. The court explained that where a statute's specificity does not "violate[] some substantive constitutional provision limiting Congress's power to address a specific problem, such as the ban on Bills of Attainder or (in some instances) the Equal Protection clause, * * * we see no reason why the specificity should suddenly become fatal merely because there happened to be a pending lawsuit." *Id.* at 1097.

Petitioner does not take issue with the D.C. Circuit's decision in *National Coalition*. To the contrary, petitioner concedes that *National Coalition* is "perfectly reconcilable with the rule of *Klein*." Pet. 15. Instead, petitioner argues that the unpublished order in this case represents a fundamental departure from *National Coalition* that adopts a new (and, in petitioner's view, unwarranted) separation-of-powers rule.

The short answer is that petitioner's characterization of the panel's order is at odds with the panel's own understanding of its decision. The rules of the D.C. Circuit require the publication of any decision that "alters, modifies, or significantly clarifies a rule of law previously announced by the court." D.C. Cir. R. 36(a)(2)(B). The panel's decision not to publish the present order thus signifies that the panel itself did not understand the order to "alter[], modif[y], or significantly clarif[y]" (*ibid.*) the legal rules announced in *National Coalition*, and did not regard the order as having any other "precedential value." *Id.* R. 36(c)(2). That is hardly a surprising conclusion, for the order says nothing more than that peti-

tioner's *Klein* claim "is foreclosed by our decision in *National Coalition*." Pet. App. 4a. Thus, contrary to petitioner's suggestion, the order leaves the state of the law in the D.C. Circuit regarding *Klein* exactly where it stood when the court issued its published decision in *National Coalition*—a decision that petitioner neither quarrels with nor asks this Court to disapprove.

As *National Coalition* demonstrates, the fact that legislation is directed at pending litigation does not render it unconstitutional under *Klein*, even if the legislation is confined to a single suit and even if it determines the outcome of the suit. 269 F.3d at 1097; *Apache Survival Coal.* v. *United States*, 21 F.3d 895, 901-904 (9th Cir. 1994); see also *Robertson*, 503 U.S. at 437-441. Indeed, petitioner itself concedes that *Klein* permits Congress to enact legal rules that are specific to an individual case as long as the case constitutes a "legitimate class of one." Pet. 16 (quoting *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 472 (1977)). Petitioner's complaint is that, in this particular instance, Congress did not have a legitimate basis for treating the pending TAPS quality-bank proceeding differently from future proceedings. *Ibid.*

As the court of appeals recognized in *National Coalition*, whether or not a particular "class of one" is "legitimate" is a concern of other constitutional doctrines, such as equal protection, not the separation-of-powers doctrine. In this case, the court of appeals rejected petitioner's separate equal protection challenge to Section 4412(b)(1) (Pet. App. 4a), and petitioner does not seek review of that equal protection holding here. It was right to do so, for Congress had ample grounds for treating the pending proceeding differently from future

ones.[3] In any event, whether the pending proceeding qualifies as a "legitimate class of one" is a factbound question of no consequence beyond the confines of this litigation itself, and hence one that does not warrant this Court's review.

3. Contrary to petitioner's suggestion (Pet. 19-20), there is no conflict between the decision of the D.C. Circuit in this case and the decisions of other courts of appeals. Like the decision here, each of the decisions cited by petitioner sustained rather than invalidated the constitutionality of a challenged statute under *Klein*. *Lindh* v. *Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997); *Crater* v. *Galaza*, 491 F.3d 1119, 1128 (9th Cir. 2007); *Green* v. *French*, 143 F.3d 865, 875 (4th Cir. 1998), cert. denied, 525 U.S. 1090 (1999), abrogated on other grounds by *Williams* v. *Taylor*, 529 U.S. 362 (2000). Moreover, in the course of rejecting *Klein* claims, these decisions emphasize that "[r]egulating relief is a far cry from limiting the interpretive power of the courts" under *Klein*. *Lindh*, 96 F.3d at 872; *Crater*, 491 F.3d at 1128 (quoting *Lindh*); *Green*, 143 F.3d at 875. And to the extent that

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[3] Prior to the D.C. Circuit's decision in late 1999 in *Exxon Co.* v. *FERC*, 182 F.3d 30, the shippers in this proceeding may have assumed that any changes by the Commission in quality-bank adjustments would be given effect only prospectively, as the Commission and the court itself had done at earlier points in the proceeding, and thus conducted their business affairs in reliance on the rates in effect at the time. Cf. pp. 3-5, *supra*. By adopting a refund cutoff date of February 2000, shortly after the date of the court's decision in *Exxon*, Congress legitimately gave protection to any such reliance interests. See Pet. App. 4a. In future proceedings, in contrast, the "strong equitable presumption in favor of retroactivity" announced in *Exxon*, 182 F.3d at 49, will be known to shippers from the outset of the proceedings, and hence such reliance interests in contested rates will be more attenuated.

any of them contain language that may be read as questioning the permissibility of legislating with respect to a particular pending suit, that language is dicta, for none of the decisions involved such legislation.

Petitioner cites a variety of other recent appellate decisions in which the constitutionality of a federal statute has been challenged under *Klein*. Pet. 21-22. But in every one of those cases, the *Klein* claim has been rejected. Petitioner has failed to identify any decision by any court of appeals that holds an Act of Congress to be unconstitutional under *Klein*, and we know of none other than the Ninth Circuit decision that this Court reversed in *Robertson*. If and when a court of appeals actually strikes down a statute under *Klein* in the future, this Court will have ample opportunity to address any unresolved questions regarding the reach of *Klein* that may arise at that time. Until and unless that happens, there is no need for the Court to review a uniform body of decisions, of which the unpublished order here is only the latest, that have consistently found federal legislation to satisfy *Klein*'s requirements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(8)

No. 08-212

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to this Court's Rule 15.8, petitioner Exxon Mobil Corporation submits this supplemental brief to bring to the Court's attention an order of the Federal Energy Regulatory Commission ("FERC") that resolves in petitioner's favor two issues raised by respondents in this proceeding.

On the same day petitioner filed its reply brief, FERC issued an order addressing, as does the decision of which review is sought, a valuation dispute arising from the operation of the Trans Alaska Pipeline System (TAPS) Quality Bank. See *Order Accepting Compliance Filing*, Docket No. OR06-10-003, 125 FERC ¶ 61,254 (Dec. 2, 2008) ("*Compliance Order*") (attached as an Appendix to this brief). The *Compliance Order* addressed and rejected a protest by Flint Hills Resources Alaska LLC against the TAPS carriers' filing of a particular retroactive quality bank (rate) adjustment. Flint Hills challenged the extent of the retroactive application as inconsistent with § 4412(b)(2) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144, 1778-79 (2005), which provides:

> In a proceeding commenced after the date of enactment of this Act, the Commission may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding.

In the *Compliance Order*, FERC rejected Flint Hills' argument that the relevant "first order" under § 4412(b)(2) is not the first order in the proceeding

imposing a quality bank adjustment, but rather a much later order that definitively fixes for the first time the final numerical value of the adjustment. See *Compliance Order*, 125 FERC ¶ 61,254, at ¶¶ 3, 12, 16. Adhering to the plain meaning of the statutory text, FERC held that the earlier order in the proceeding was the relevant one for purposes of calculating § 4412(b)(2)'s 15-month limitation on retroactivity because "it was the first order issued by the Commission in this proceeding and it imposed a quality bank adjustment . . . subject to refund." *Id.* ¶ 17. Flint Hills' contrary reading, FERC explained, "stands the language in [§ 4412(b)(2)] on its head" and "improperly would read the word 'first' out of the provision." *Id.* ¶ 19. FERC also contrasted the operation of § 4412(b)(2) as construed in the *Compliance Order* with the application of § 4412(b)(1) to petitioner in the proceeding now subject to the petition before this Court. In that proceeding, "[t]he Commission affirmed the [ALJ's] retroactivity ruling but limited the retroactivity period, and the resulting refunds, to February 1, 2000, in accordance with the Congressional limitation in section 4412(b)(1)." *Id.* ¶ 20 n.11.

The *Compliance Order* is relevant to – and rejects – the arguments of respondents in two important respects. *First*, several respondents had argued that this case is a poor vehicle to review the issues presented because § 4412(b)(2) does not operate in the straightforward manner described in the Petition, but is instead ambiguous. In those respondents' view, applying that provision hypothetically to petitioner *could* result in a retroactivity period *shorter* – and thus less favorable – than the actual result when FERC applied the special rule of § 4412(b)(1) to petitioner. See Br. for Williams Alaska Petroleum Inc. at 14-16; Br. for OXY USA Inc.

and Union Oil Co. at 5-7; Br. for Petro Star Inc. at 28-30. Respondent Petro Star specifically noted that "the meaning of subsection 4412(b)(2) is currently the subject of a separate proceeding currently pending before [the] FERC," and thus contended that "[p]etitioner's equal protection and due process arguments rest on a debatable and unsettled legal premise." Br. for Petro Star Inc. at 30; see Br. for OXY USA Inc. at 6-7 (outlining Flint Hills' argument).

Petitioner previously showed that the plain meaning of § 4412(b)(2) undermines respondents' argument, see Pet. Reply Br. at 10-11, and FERC's *Compliance Order* follows that same reasoning to dispel any doubt in that regard and to eliminate any "unsettled legal premise." Indeed, as the *Compliance Order* confirms, § 4412(b)(2) presents no ambiguity. It clearly establishes a more generous general rule than the case-specific directive in § 4412(b)(1) that required a particular result as applied only to petitioner. As interpreted and applied by FERC in the *Compliance Order*, the rule of § 4412(b)(2), were it applied to petitioner's case, would allow full refunds to Exxon Mobil back to 1993, as the ALJ originally ordered. See Pet. 14-15. Accordingly, this case presents a perfect vehicle for this Court to consider the important issue raised in the petition.

Second, the *Compliance Order* confirms that there is no merit to respondent Petro Star's suggestion that § 4412(b)(1) does not direct the outcome of the adjudicatory proceeding that determined petitioner's relief. Petro Star had argued that § 4412(b)(1) does "*not* 'direct' or 'dictate' a particular result in the FERC proceeding at issue" because the Commission could separately have relied on the equitable arguments presented to it. See Br. of Petro Star Inc. at 12-14. Petitioner showed that § 4412(b)(1) clearly

does direct and produce the result reflected in FERC's order. See Pet. Reply Br. at 2. In the *Compliance Order*, FERC has confirmed that petitioner is correct. That order describes the effect of § 4412(b)(1) in the proceeding determining the relief afforded to petitioner: in contrast to how, "[i]n 2004, the ALJ held that certain valuations should be retroactively changed back to 1993, with concomitant refunds back to that date," FERC later "affirmed the retroactivity ruling but limited the retroactive period, and the resulting refunds, to February 1, 2000, *in accordance with the Congressional limitation in section 4412(b)(1).*" *Compliance Order*, 125 FERC ¶ 61,254, at ¶ 20 n.11 (emphasis added). Once again, the *Compliance Order* confirms that this case presents a particularly good opportunity for this Court to consider the important separation-of-powers and due process issues presented by the petition.

CONCLUSION

For the foregoing reasons and those presented in the petition and petitioner's reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 8, 2008

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APPENDIX

APPENDIX

125 FERC ¶ 61,254

UNITED STATES OF AMERICA

FEDERAL ENERGY
REGULATORY COMMISSION

Before
Commissioners: Joseph T. Kelliher, Chairman; Suedeen G. Kelly, Marc Spitzer, Philip D. Moeller, and Jon Wellinghoff.

Docket No. OR06-10-003

BP Pipelines (Alaska) Inc.
ConocoPhillips Transportation Alaska, Inc.
ExxonMobil Pipeline Company
Koch Alaska Pipeline Company
Unocal Pipeline Company

ORDER ACCEPTING COMPLIANCE FILING

(Issued December 2, 2008)

1. This matter involves valuation under the Trans Alaska Pipeline System (TAPS) Quality Bank, which is a system for making monetary adjustments among shippers on TAPS for the differing qualities of Alaska North Slope (ANS) crude petroleum shipped on TAPS.

2. On April 2, 2008, the TAPS Carriers[1] filed the compliance filing to be effective June 1, 2006, as ordered by the Commission's March 20, 2008 Order in Opinion No. 500.[2]

3. Flint Hills Resources Alaska LLC (Flint Hills) protested the proposed effective date of June 1, 2006, as violating section 4412 (b)(2) of the Motor Carrier Safety Reauthorization Act of 2005 (section 4412 (b)(2)).[3] The Commission accepts the compliance filing and rejects Flint Hills' protest.[4]

Background

4. The TAPS Quality Bank is administered by the Quality Bank Administrator (QBA), an independent neutral expert. The tariff provides for the QBA to give notice of any proposed or needed modification to the pricing scheme governing the Quality Bank.

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[1] The TAPS Carriers consist of BP Pipelines (Alaska) Inc., ConocoPhillips Transportation Alaska, Inc., ExxonMobil Pipeline Company, Koch Alaska Pipeline Company, LLC and Unocal Pipeline Company.

[2] *BP Pipeline (Alaska) Inc.*, 122 FERC ¶ 61,236, Ordering Paragraph B (2008), appeal docketed *Petro Star v. FERC* (D.C. Cir. 08-1192).

[3] Pub. L. No. 109-59, 119 Stat. 1714 (2005) (The Act).

[4] ConocoPhillips Alaska, Inc. filed an answer on April 30, 2008, and Chevron U.S.A. and Union Oil Corp of California jointly filed an answer on May 2, 2008. On May 7, 2008, Flint Hills replied to the answers of Chevron and ConocoPhillips. On May 14, 2008, Petro Star filed an answer to the answers of Chevron and ConocoPhillips. On May 20, 2008, Chevron filed a response to Flint Hills and Petro Star's filing. Pursuant to Commission Rule 213(a)(2), which precludes answers to protests, unless otherwise ordered, the Commission rejects all the subsequent filings in response to Flint Hills' protest.

5. The TAPS Quality Bank is based on a distillation valuation model, which calculates the value of crude oil streams by first determining the suite of end-use products refined from the ANS common stream, and then valuing these products based upon published, publicly available prices. The QBA then allocates those values, proportionally, to each producer's original ANS crude tender. Some Quality Bank cuts can be sold without further processing, while other cuts, including the Heavy Distillate cut, need further processing before they can be sold as a finished petroleum product. Where processing is necessary, the QBA deducts the cost of processing from the market price of the finished product. The processing costs thus reduce the value of that particular cut.

6. In 2005, the Commission, in Opinion No. 481, established the reference price to value the West Coast Heavy Distillate cut as Platts' West Coast spot quote for Los Angeles (LA) Pipeline Low Sulfur (LS) (EPA) Diesel, which contained a sulfur content of 500 parts per million (ppm).[5] An adjustment of 6.4302 cents per gallon (cpg) is deducted from the reference price to account for the cost of processing 5,000 ppm sulfur ANS crude to the 500 ppm sulfur content of the proxy. On July 28, 2006, the TAPS Carriers filed a notice with the Commission that included the QBA's notice to change the proxy price used to value the West Coast Heavy Distillate cut, effective June 1, 2006. The QBA filed the notice because Platts changed the LS diesel reference price to an ultra low

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[5] *Trans Alaska Pipeline System*, 113 FERC ¶ 61,062 (2005) PP 50-78 (Opinion No. 481), *order on reh'g*, 114 FERC ¶ 61,323 (2006) (Opinion No. 481-A), *order on reh'g*, 115 FERC ¶ 61,287 (2006) (Opinion No. 481-B) (collectively, Opinion No. 481), *aff'd sub nom. Petro Star Inc. v. FERC*, No. 06-1136, 2008 U.S. App. LEXIS 5328 (D.C. Cir., Mar. 6, 2008).

sulfur diesel price with a sulfur content of only 8 ppm.

7. The QBA notice stated that because more expensive processing is required to meet the lower 8 ppm sulfur specification of this product he recommended that the new replacement price for the West Coast Heavy Distillate cut should be the LA Pipeline Ultra Low Sulfur (ULS) (EPA) Diesel minus a proposed processing cost adjustment of 10.4549 cpg.

8. While all the parties agreed to the proposed new reference proxy, some objected to the proposed processing cost adjustment to the proxy's price. Accordingly, the Commission issued an order on September 26, 2006, which accepted the QBA's recommendation both of the new proxy and the proposed processing cost adjustment of 10.5459 cpg "effective June 1, 2006, subject to refund," and established a hearing to determine the amount of the processing cost adjustment.[6] The order stated the value of the cut "will be subject to refund when the Commission issues the final order."

9. On September 7, 2007, after hearing, the Administrative Law Judge (ALJ) issued an Initial Decision (ID).[7] The ID determined how the QBA should calculate the processing cost and left it to him to calculate the amount of that adjustment. This was the same procedure followed in prior Quality Bank proceedings. The Commission affirmed the rulings in the ID in Opinion No. 500, issued March 20, 2008, and directed the TAPS Carriers "to make a

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[6] *BP Pipeline (Alaska) Inc.*, 116 FERC ¶ 61,291 (2006) (September 26 Order).

[7] *BP Pipeline (Alaska) Inc.*, 120 FERC ¶ 63,018 (2007).

compliance filing establishing the processing cost adjustment for the West Coast Heavy Distillate cut."

10. The compliance filing established an 8.1340 cpg processing cost adjustment as of June 1, 2006, the effective date for the adjustment under the Commission's September 26 Order, a little more than 2 cents less than the QBA's proposed amount of 10.4549 cpg. The September 26 Order also provided that the amount of the cost adjustment would be revised annually each February using the Nelson Farrar Refinery Operating Cost indices. Accordingly, the 8.1340 cpg processing cost adjustment as of June 2006 was revised to 9.1719 cpg effective February 2007, and to 9.3421 cpg effective February 2008. The compliance filing stated that after the Commission acted on the compliance filing revised invoices would be issued for each month starting June 2006, since the QBA's originally proposed 10.4549 cpg processing cost adjustment was accepted subject to refund and has remained effective since June 2006.

Flint Hills' Protest

11. Flint Hills contends the proposed June 1, 2006, effective date is a retroactive TAPS Quality Bank adjustment that exceeds the permissible 15-month period for retroactive changes to quality bank adjustments permitted by section 4412 (b)(2). That section provides that:

> [i]n a proceeding commenced after the date of enactment of this Act, the Commission may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding.

12. Flint Hills asserts that the instant proceeding falls under section 4412 (b)(2) since it commenced after the enactment of the Act. Flint Hills argues that the issue here is when is the first order imposing quality bank adjustments in this proceeding from which the 15-month period is calculated. Flint Hills contends this only occurs when the processing cost adjustment is fixed in numerical form. Flint Hills rejects Opinion No. 500 as the date from when the 15-month period is calculated because Flint Hills asserts that Opinion No. 500 only determined how the adjustment should be calculated, and did not "impose any specific quantified adjustment."[8] Flint Hills also rejects the September 26 Order as the first order imposing adjustments because it was "an interim adjustment ... subject to refund depending on the outcome of the hearing."[9] Accordingly, Flint Hills asserts that the "first order" imposing such adjustments, within the meaning of section 4412 (b)(2), will not occur until there is Commission approval of the compliance filing which establishes the applicable processing cost adjustment to the proxy price for the Heavy Distillate cut. Consequently, Flint Hills argues the 15-month period under section 4412 (b)(2) will not be calculable until the date of the Commission order approving the compliance filing, as that would be "the earliest date of the first order" imposing such adjustment in this proceeding.

13. Flint Hills concludes that the effective date for the compliance filing cannot be earlier than 15 months prior to the date the Commission accepts the compliance filing. Flint Hills states, for example,

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[8] Flint Hills' Protest at 3.

[9] Flint Hills' May 7, 2008 Reply at 3.

that if the Commission accepts the compliance filing by an order issued May 1, 2008, the effective date of that order cannot precede February, 1, 2007. Thus, Flint Hills argues, accepting the instant compliance filing effective June 1, 2006, would be error, and the Commission should issue an order accepting the compliance filing effective no earlier than 15 months preceding the date of that order.

Discussion

14. The Commission concludes that the September 26 Order is the first order referred to in section 4412 (b)(2) which imposed a quality bank adjustment in this proceeding. Accordingly, the C mmission finds no merit in the protest, and accepts the compliance filing because June 1, 2006, is within the permissible 15-month period under section 4412 (b)(2).

15. The Commission established this proceeding in September 2006 for the purpose of determining the amount of the processing cost adjustment to the value of the new proxy, which proxy the Commission accepted in the September 26 Order. That order accepted the new proxy and the proposed processing cost adjustment to that proxy's value, effective June 1, 2006, "subject to refund," namely subject to the outcome of this proceeding. However, that processing cost adjustment was operative, and was an adjustment imposed on Quality Bank participants.

16. We find no merit in Flint Hills' argument that the term "imposing" in section 4412(b)(2) refers to the Commission's order that "approves the final quantification of a new adjustment."[10]

17. The Commission finds that the September 26 Order fits the statutory definition in section

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[10] Flint Hills' Protest at 2-3.

4412(b)(2) since it was the first order issued by the Commission in this proceeding, and it imposed a quality bank adjustment by changing the valuation of the Heavy Distillate cut from the existing LS Diesel price minus 6.4302 cpg to the ULS Diesel price minus 10.4519 cpg, subject to refund. That processing cost adjustment has been in effect since that time. Thus, the September 26 Order accepting the replacement price for the Heavy Distillate cut, subject to refund, meets both of the statutory requirements of section 4412(b)(2).

18. The 15-month limit refers to the "first order of the[Commission] imposing quality bank adjustments in the proceeding." Thus, the section 4412(b)(2) preceding "15-month period" would be calculated from the September 26 Order, not the date of the order accepting any compliance filing. June 1, 2006, is clearly within that period, and thus satisfies the 15-month limit set forth in section 4412(b)(2).

19. The September 26 Order subjected the quality bank adjustment imposed and effectuated by that order to a hearing that potentially could result in a change to that adjustment. However, section 4412(b)(2) does not require the adjustment in the first order be final and not subject to change. On the contrary, by referring to "the earliest date of the first order," Congress clearly contemplated that the Commission might issue subsequent orders in the proceeding which could change the initially established quality bank adjustment. Flint Hills' position, that the term "imposing" in section 4412(b)(2) refers to the compliance filing in a proceeding, stands the language in that section on its head because the order accepting the compliance filing is the last order in that proceeding. Interpreting section 4412(b)(2) as Flint Hills proposes

improperly would read the word "first" out of the provision.

20. While section 4412(b)(2) limited the Commission's authority to order retroactive quality bank adjustments, it did not affect the refund authority conferred by section 15(7) of the Interstate Commerce Act (ICA). It is section 15(7) of the ICA that authorizes the Commission to impose retroactive adjustments back to the date set in the September 26 Order, not section 4412(b)(2). Section 4412(b)(2) merely limits the number of months preceding the September 26 Order that can be included in the refund period. Furthermore, while the first order in response to a pipeline filing is usually issued before 15 months would elapse, the ruling here does not mean that the 15-month limitation in section 4412(b)(2) can never come into play. For example, section 4412 (b)(2) would apply in the case of an "unlawful order," which apparently is the situation that motivated Congress to adopt the 15-month limitation as reflected in the material cited in Flint Hills' Protest at n.9.[11] It follows that Congress, in addition to taking remedial action affecting a pending case through section 4412(b)(1), would also include a

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[11] That material shows that the concern addressed by section 4412 was a retroactive valuation as in Opinion No. 481, *supra* note 5. In that case, the Commission accepted certain quality bank valuations but the court reversed the Commission on certain valuations and remanded those valuations to the Commission for further action. The Commission then set those valuation issues for hearing. In 2004, the ALJ held that certain valuations should be retroactively changed back to 1993, with concomitant refunds back to that date. The Commission affirmed the retroactivity ruling but limited the retroactive period, and the resulting refunds, to February 1, 2000, in accordance with the Congressional limitation in section 4412 (b)(1).

provision, section 4412 (b)(2), designed to prevent a recurrence of the prospect of a lengthy refund period caused by extended litigation over an unlawful order.

The Commission orders:

The TAPS Carriers' April 2, 2008 compliance filing is accepted, effective June 1, 2006.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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No. 08-212

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT PETRO STAR INC.

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SUPPLEMENTAL BRIEF OF RESPONDENT PETRO STAR INC.

Pursuant to this Court's Rule 15.8, Respondent Petro Star Inc. submits this supplemental brief in response to the "Supplemental Brief of Petitioner," which wrongly contends that FERC's December 2, 2008 Order in a separate TAPS ratemaking proceeding supports a grant of review in this case. *See* Pet. Supp. Br. at 1 (citing *Order Accepting Compliance Filing*, 125 FERC ¶ 61,254 (Dec. 2, 2008)) (reproduced at Pet. Supp. Br. App. 1a-10a) ("December 2 Order"). Neither of Petitioner's two points has any merit.

First, Petitioner contends that the December 2 Order supposedly confirms that, had Congress made section 4412(b)(2) applicable to pending cases (instead of creating a different rule in section 4412(b)(1) for such cases), Petitioner would have received a retroactive award back to 1993. Pet. Supp. Br. 3. This differential treatment, according to Petitioner, violates its "'equal protection and due process'" rights and warrants this Court's review. *Id.* (citation omitted). Both the premise and the conclusion of this argument are wrong.

The conclusion is wrong, because even assuming (contrary to the reality) that the December 2 Order somehow confirmed that 4412(b)(2) would have produced a more favorable outcome here than 4412(b)(1), the Petition would still raise no certworthy issue. Congress's decision to adopt different retroactivity limits in section 4412 for pending and future TAPS ratemaking proceedings bears *only* on Petitioner's passing suggestion—made in a single paragraph of the Petition—that this differential treatment lacks a rational basis and therefore violates Petitioner's equal protection and due process rights. Pet. 17.

(Petitioner does not, and cannot, contend that the mere fact that Congress prescribes a different rule for pending cases than for future cases is inconsistent with *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).) But Petitioner's argument that this distinction lacks a rational basis raises an issue that—as Respondent has explained—is utterly factbound, presents no circuit split, and lacks merit. *See* Br. in Opp. for Petro Star at 27-28.

Moreover, Petitioner's premise is demonstrably wrong: nothing in the December 2 Order suggests that section 4412(b)(2), were it applicable here, would have produced the outcome that Petitioner wanted, *i.e.*, 11 years of retroactive refunds back to 1993. Pet. Supp. Br. 3. On the contrary, FERC's December 2 Order *expressly* distinguishes the rate dispute at issue there from the FERC orders before this Court. Pet. Supp. Br. App. 9a-10a. The December 2 Order states:

> "[T]he ruling here does not mean that the 15-month limitation in section 4412(b)(2) can never come into play. For example, section 4412(b)(2) would apply in the case *of an 'unlawful order,' which apparently is the situation that motivated Congress to adopt the 15-month limitation* as reflected in the material cited .... [Footnote omitted] It follows that Congress, in addition to taking remedial action affecting a pending case through section 4412(b)(1), would also include a provision, section 4412(b)(2), designed to prevent a *recurrence* of the prospect of a *lengthy refund period caused by extended litigation over an unlawful order*."

Pet. Supp. Br. App. 9a-10a (emphases added). The footnote omitted from the above quotation further explicitly confirms that "the concern addressed by section 4412 was a retroactive valuation as in Opinion No. 481" *i.e.*, the principal FERC order at issue here. *Id.* at 9a n.11. Thus, even if FERC's December 2 Order is correct in its construction of section 4412(b)(2),[1] that Order, by its plain terms, cannot be construed to validate the "lengthy refund period" sought here.

On top of all this, even if the December 2 Order could be read to support Petitioner's cursory rational-basis argument, the Order cannot be said to settle the meaning of section 4412(b)(2), inasmuch as the Order remains subject to further proceedings, including a possible petition for rehearing before FERC and a possible petition for review in the D.C. Circuit.

Second, Petitioner contends that the December 2 Order's summary of *this* case in a footnote somehow establishes that Respondent is wrong in contending that section 4412(b)(1) did not direct or dictate a particular outcome. Pet. Supp. Br. 3-4. The suggestion is frivolous. The footnote sentence upon which Petitioner relies merely restates the bottom-line result that the FERC order in this case limited retroactivity to February 1, 2000, in accordance with section 4412(b)(1). Pet. Supp. Br. App. 9a n.11. That this was the ultimate ruling of FERC in this case is hardly a new fact, and the December 2 Order's unadorned restatement of that bare result does nothing

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[1] Respondent does not concede that the December 2 Order is correct. *See* Pet. Supp. Br. App. 2a n.4 (noting that Petro Star, among others, filed answers that were rejected by FERC).

to change the record or the ruling before this Court. As Respondent has explained, that record confirms that the parties in this case presented FERC with a variety of arguments concerning whether and to what extent payments should be made retroactive, and section 4412 did *not* purport to resolve all of those issues, so as to dictate a specific outcome; instead, it merely placed an outer limit on the extent of any retroactivity. Br. in Opp. for Petro Star 13-14. FERC's orders here explained at great length its reasons for resolving these issues as it did. Pet. App. 79a-88a, 183a-192a. Indeed, in rejecting the various equitable arguments against *any* retroactivity, FERC expressly noted that these arguments had more force in the pre-2000 time frame, so that section 4412(b)(1)'s February 2000 time limit actually "undermined" the anti-retroactivity argument. *Id.* at 81a. Nothing in the footnote sentence on which Petitioner relies even purports to (or could) alter the actual ruling and reasoning of FERC in this case.

CONCLUSION

For the foregoing reasons, and those stated in Respondent's brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

SUPPLEMENTAL BRIEF FOR WILLIAMS ALASKA PETROLEUM INC.

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the brief in opposition for Williams Alaska Petroleum Inc. remains accurate.

SUPPLEMENTAL BRIEF FOR WILLIAMS ALASKA PETROLEUM INC.

In its supplemental brief, petitioner contends that a recent order issued by the Federal Energy Regulatory Commission ("FERC") "resolves in petitioner's favor two issues raised by respondents in this proceeding" and therefore removes those obstacles to this Court's review. Pet. Supp. Br. 1. Petitioner's eleventh-hour effort to salvage its arguments in favor of certiorari is unavailing.

Petitioner first argues that FERC's order rejecting Flint Hills' interpretation of Section 4412(b)(2) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users conclusively establishes that "the rule of § 4412(b)(2), were it applied to petitioner's case, would allow full refunds to Exxon Mobil back to 1993." Pet. Supp. Br. 3. But petitioner fails to mention that FERC's order in the Flint Hills matter explicitly identified this TAPS Quality Bank proceeding as an example of a case in which its interpretation of Section 4412(b)(2) would *not* apply. Supp. App. 9a.

In the Flint Hills order, FERC recognized that, as a general matter, "the earliest date of the first order of the [FERC] imposing quality bank adjustments in the proceeding" within the meaning of Section 4412(b)(2) is the date of "the first order issued by the Commission . . . impos[ing] a quality bank adjustment by changing the valuation of" a petroleum cut and that Section 4412(b)(2) "does not require the adjustment in the first order be final." Supp. App. 8a. FERC also declared, however, that this general rule would not apply "in the case of an 'unlawful order'" imposing quality bank adjustments—which,

FERC explained, "apparently is the situation that motivated Congress to adopt the 15-month limitation" imposed by Section 4412(b)(2). *Id.* at 9a. As an example of such an "unlawful order," FERC pointed to its original order in this case, which "accepted certain quality bank valuations" that were subsequently "reversed" by the D.C. Circuit "and remanded . . . to the Commission for further action." *Id.* at 9a n.11.

By explicitly invoking this case, FERC made clear that, if Section 4412(b)(2) had been applicable to this proceeding, the "date of the first order of the [FERC] imposing quality bank adjustments" would not have been the date on which FERC issued its unlawful 1993 order but would instead have been the date of the ALJ's 2005 decision ordering refunds of Quality Bank Resid component adjustments. Pet. App. 165-92a. Thus, as explained in Williams' brief in opposition, the application of Section 4412(b)(2) in this case would actually have provided petitioner with a shorter refund period than Section 4412(b)(1), which provides it with refunds back to February 1, 2000. Williams Br. in Opp. 14. The fact that petitioner received a more generous refund period under Section 4412(b)(1) than it would have received under Section 4412(b)(2) irretrievably nullifies petitioner's constitutional objections to Section 4412(b)(1).

Petitioner also contends that FERC's order in the Flint Hills matter conclusively establishes that Section 4412(b)(1) impermissibly "direct[ed] the outcome of the adjudicatory proceeding that determined petitioner's relief" because that order recognizes that FERC "'limited the retroactive period'" in this case "'*in accordance with the Congressional limitation in section 4412(b)(1).*'" Pet. Supp. Br. 4 (quoting Supp. App. 9a n.11) (emphasis added by petitioner). But, as this Court has frequently reiterated, Congress

may amend applicable law without violating the separation-of-powers principles articulated in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). *See, e.g.*, *Miller v. French*, 530 U.S. 327, 349 (2000). Section 4412(b) falls comfortably within Congress's constitutional authority because it "amends the applicable substantive law" governing refunds in TAPS Quality Bank proceedings. *Nat'l Coalition to Save our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001).

Ultimately, the arguments raised in petitioner's supplemental brief are therefore completely beside the point. Even if FERC had authoritatively construed Section 4412(b)(2) in the manner that petitioner suggests, the Flint Hills order would not have altered the fact that petitioner's constitutional challenge to Section 4412(b)(1) is conclusively foreclosed by this Court's precedent, which—as petitioner itself acknowledges (Pet. 12)—establishes that *Klein*'s "prohibition does not take hold when Congress amend[s] applicable law." *Miller*, 530 U.S. at 349; *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995). Nothing in FERC's recent order provides any conceivable basis for revisiting that unbroken line of authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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INTRODUCTION

This case presents the straightforward question whether *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871), and related constitutional principles limit Congress' ability to direct the outcome of one adjudicatory proceeding to the detriment of a single private party while applying to all other like cases a different general rule. Respondents do not address the risk of corruption inherent in case-specific legislation like that here, which the Alaska congressional delegation slipped into a conference bill without debate solely to benefit Alaska refiners. Nor do respondents deny that lower courts continue to struggle with and diverge regarding the application of *Klein* in a variety of contexts – particularly over the meaning of *Klein*'s prohibition against Congress' directing the outcome of particular cases. Instead, respondents principally contend that the particular facts of this proceeding, including its administrative context, should preclude review by this Court, or they simply argue on the merits that *Klein* is limited in a manner that this Court has never resolved. These arguments are without merit, and this Court should grant review of this important separation-of-powers issue that determines whether individuals have a right to have their cases resolved by rules of general applicability rather than by discrete legislative intervention.

ARGUMENT

1. As a preliminary matter, only respondent Petro Star argues that the facts of this case do not even raise the important question presented by the

petition, Petro Star ("PS") Opp. 12-16,[1] a claim that is clearly without merit.

First, Petro Star contends that the provision petitioner challenges ("§ 4412(b)(1)"[2]) "did not 'direct' or 'dictate' a particular result in the FERC proceeding at issue," because FERC "retained substantial discretion to evaluate the equities as it saw fit." PS Opp. 12, 14. FERC, of course, squarely determined that § 4412(b)(1) precluded it from awarding any retroactive relief for periods before February 1, 2000 and rejected (as the ALJ also had done) respondents' equitable arguments that retroactive relief was unwarranted. Pet. App. 165a-192a. Whatever discretion FERC may theoretically have retained to grant *less* relief than Congress indicated, it had no discretion to grant greater relief, including the relief that the ALJ had already determined was otherwise appropriate under law. In this relevant sense, § 4412(b)(1) dictated the outcome of this case, which thus directly sets forth the question presented in the petition.

Second, Petro Star claims that this case involves no "pending adjudication" because administrative agencies do not adjudicate and "[r]atemaking is an essentially legislative act, not an adjudicative one." PS Opp. 16 (internal quotation marks omitted;

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[1] Petro Star itself took a quite contrary position before the D.C. Circuit, where it directly addressed the applicability of *Klein* rather than resting on an assertion that the case did not present the issue for which review is now sought and that was fully litigated below. *See* Joint Brief of Intervenors at 6-9, *Petro Star Inc. v. FERC*, Nos. 06-1166, *et al.* (D.C. Cir. filed May 15, 2007).

[2] Safe, Accountable, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 4412(b)(1), 119 Stat. 1144, 1778 (2005).

alteration in original). Administrative agencies certainly do undertake adjudications, see *infra* at 5-6, and such adjudications can, as here and in an array of federal district court proceedings, address rate issues without acting in a "legislative" capacity. Respondent confuses prospective ratemaking, usually undertaken through rulemaking (and analogized to legislation, see, *e.g.*, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947)), with adjudications that apply law to facts in particular cases (and deemed adjudicative, see, *e.g.*, *United States* v. *Fla. E. Coast Ry.*, 410 U.S. 224, 245 (1973); *infra* at 6). Here, an administrative law *judge*, after a lengthy hearing involving witnesses and presentation of additional evidence, resolved ExxonMobil's claim against other private parties by applying existing law to the particular facts before him. See *Trans Alaska Pipeline Sys.*, 108 FERC ¶ 63,030 ¶¶ 2771-2952 (2004); 18 C.F.R. § 385.504 (duties and powers of FERC ALJ at hearing). Indeed, an administrative agency acting in its rulemaking capacity generally cannot provide the kind of retroactive relief originally ordered by the ALJ – and undone by Congress – here. See, *e.g.*, *Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 578 & n.8 (1981).

Third, Petro Star states that § 4412(b)(1) "change[s] . . . applicable law" rather than embodies "a direction to reach a particular result under old law," and thus presents no issue related to *Klein*. PS Opp. 15 (citing *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992)). This claim simply asserts an answer to the question presented. It is true that § 4412(b)(1) changed the law, just as the statute set aside in *Klein* also changed the law in a manner that directed the outcome of particular cases. The question presented, however, includes whether a statute that targets a single case and directs its

outcome contrary to the general rule, in the manner undertaken by § 4412(b)(1), is an impermissible "direction" within the scope of *Klein* or a "change in the applicable law" within the scope of *Robertson*. This is clearly an open issue, with strong arguments that *Klein* controls this case and *Robertson* is inapplicable. See Pet. 11-19. In any event this is an issue for the merits, not a reason to deny the petition.

2. The United States and other respondents argue that review is not warranted because *Klein* does not apply beyond Article III courts or to cases decided by Article I adjudicative bodies. See, *e.g.*, U.S. Opp. 10-11 & n.2. This is a startling and incorrect position, and its significance underscores the need to grant review.

Respondents' argument is incorrect for three reasons. First, both this Court in *Klein* and the D.C. Circuit in this proceeding addressed the statute's effect on the powers of the reviewing Article III court as well as the adjudicator that initially applied the statute. See *Klein*, 80 U.S. (13 Wall.) at 144 (statute directs treatment of evidence "both in the Court of Claims and in this court on appeal"); *id.* at 145-46; Pet. App. 4a. In resolving the petition based on its prior decision in *National Coalition to Save Our Mall* v. *Norton*, 269 F.3d 1092 (D.C. Cir. 2001), which dealt with Article III courts, the D.C. Circuit made clear that its holding and interpretation of *Klein* applied equally to both Article I and Article III adjudicators. Pet. App. 4a. This approach and that taken in *Klein* make sense: a statute that directs the results in an adjudication subject to review by an Article III court also has the effect of directing the result on appeal.

Second, *Klein* addressed a statute that directed an initial outcome in the Court of Claims, an Article I court. See *Ex Parte Bakelite Corp.*, 279 U.S. 438, 454

(1929); Br. of WLF as *Amicus Curiae* 20. The United States argues that the Court in *Klein* must have viewed the Court of Claims as an Article III court because, although initially constituted as an administrative body, Congress later modified that body to exercise the powers of a true, "inferior" court. U.S. Opp. 11 n.2. But the language in *Klein* and other authorities cited by the Government simply underscores this Court's focus on whether the Court of Claims carried out judicial functions subject to further review. *Klein* did not decide whether the Court of Claims was an "inferior court" established by Congress pursuant to Article I (like the Tax Court or the Court of Appeals for the Armed Forces), or one established pursuant to Article III (like district courts). This Court resolved that question in *Bakelite*, 279 U.S. at 454-55, and determined that the Court of Claims was an Article I court.

Third, and more fundamentally, respondents fail to recognize the nature of the adjudicative power that Congress vests in administrative agencies and how, for purposes of *Klein*, this power is indistinguishable from that vested in Article III courts. As early as the beginning of the administrative state, Congress determined that administrative agencies can function identically to courts and adjudicate disputes between private parties involving public rights. In the Interstate Commerce Act ("ICA"), which governed the FERC proceeding below[3] and which served as the template for other statutes administered by federal agencies, see *Verizon Comm'n, Inc.* v. *FCC*, 535 U.S. 467, 478 n.3 (2002), Congress provided for the ICC to

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[3] Oil pipelines are regulated under a recodified version of the ICA in effect on October 1, 1977, which FERC administers. *See Frontier Pipeline Co.* v. *FERC*, 452 F.3d 774, 776 (D.C. Cir. 2006).

adjudicate disputes regarding the application of law to fact, even between private parties, and sharply distinguished that power from the agency's rulemaking power. See, *e.g.*, ICA, ch. 104, § 13, 24 Stat. 379, 383-84 (1887); *Baer Bros. Mercantile Co.* v. *Denver & Rio Grande R.R.*, 233 U.S. 469, 487 (1914) (1906 amendments to ICA retained Commission's power to adjudicate rate disputes and gave Commission "new power to make rates for the future"). Indeed, Congress provided private litigants with the choice of seeking remedies for identical violations of law before the administrative agency, acting as an adjudicator, or before an Article III court. ICA § 9, 24 Stat. at 382. Similar provisions exist today; for example, a private party claiming that another party has violated the Communications Act may seek damages in federal district court or before the FCC. 47 U.S.C. § 207. Judges in both bodies perform identical functions, and the resulting orders of both are subject to review in an Article III court of appeals. *Klein*'s command that Congress not direct the outcome of a particular case should and does apply equally to each. Compare *Univ. of Tenn.* v. *Elliott*, 478 U.S. 788, 798 n.6 (1986) ("'To the extent that administrative adjudications resemble courts' decisions . . . the law worked out for courts does and should apply to agencies.'") (citation omitted), and *Bell* v. *New Jersey*, 461 U.S. 773, 779-80 (1983) (equivalent finality principles apply to federal trial court determinations and administrative adjudications).

Respondents' theory also produces startling results that underscore the need for review of this case. Under respondents' artificial limitation of *Klein* to initial adjudications by Article III courts, *Klein* would have no application to statutes that direct outcomes

against individual litigants, including in favor of private claimants or the government itself, before any range of adjudicators created by Congress pursuant to powers other than Article III. Congress could, in this view, dictate the import of evidence or otherwise direct the outcome with retroactive effect in specific, formal adjudicative proceedings before the FCC, courts martial (including the Court of Appeals for the Armed Forces), the National Labor Relations Board, territorial courts, the Tax Courts, the Commodities Futures Trading Commission, the current United States Court of Federal Claims, and the District of Columbia courts. Under respondents' theory, such a statute would equally constrain this Court or other Article III courts sitting in review of those adjudications.[4] In relying upon such an extreme theory, respondents merely underscore the importance of the issue presented by the petition and the need for this Court to clarify the bounds of *Klein*. See, *e.g.*, *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 378 (1940) (outlining due process limitations on statutes interfering with administrative proceedings).

3. The United States asserts that no "conflict" exists among the courts of appeals because all the cited decisions "sustained rather than invalidated the constitutionality of a challenged statute under *Klein*." U.S. Opp. 15. This is a simple *non sequitur*. While it

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[4] Similarly, the United States argues that review is not warranted because "this is not a case in which Congress is attempting to decide the controversy at issue in the Government's own favor." U.S. Opp. 12 (internal quotation and alteration omitted). This factual distinction hardly supports the conclusion the Government seeks. The fact that Congress is, in this case, "tak[ing] property from [person] A. and giv[ing] it to B," *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 388 (1798), aggravates rather than alleviates the Constitutional difficulty underlying § 4412(b)(1).

is true that no court of appeals since *Robertson* has invoked *Klein* as the basis for declaring a statute unconstitutional, that was not the point of the petition, nor is it the relevant inquiry for this Court. Instead, the petition argued at length that courts of appeals have taken sharply divergent views regarding the scope and import of *Klein*, with several agreeing with petitioner – and disagreeing with the D.C. Circuit – that "Congress may not predetermine the results in any given case," *Crater* v. *Galaza*, 491 F.3d 1119, 1128 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2961 (2008), nor may it "tell courts how to decide a particular case." *Lindh* v. *Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997). See Pet. 19-23 (collecting cases). In no previous case has Congress acted so blatantly to resolve a private dispute without applying the new rule of law prospectively. Respondents have no good answer to this, and likewise fail to rebut petitioner's showing that disputes over the application of *Klein* continue to bedevil the courts of appeals and have arisen in a range of important contexts. Pet. 21-23.

4. Respondent Petro Star attempts to dismiss petitioner's due process challenge by characterizing it as a fact-bound attack on the wisdom of Congress' choice, PS Opp. 27-28, but that misconstrues the due process interests at issue here. A legislature's action to disturb an adjudicative process, by directing a particular outcome for one case by departing from the general, otherwise applicable rule, deeply harms the equal protection and due process interests that adjudication is particularly designed to protect. See *Klein*, 80 U.S. (13 Wall.) at 145-46. These interests clearly extend to the administrative context. In *Paramino Lumber*, which the United States invokes for other purposes, this Court considered whether

Congress had the power to pass a private act requiring the rehearing of a particular worker's compensation claim. This Court upheld the act as curing a prior administrative defect and as permitting rehearing according to pre-existing law, and concluded that there was no due process violation because the "private act does not set aside a judgment . . . or direct the entry of an award" and instead provides for a new hearing "subject to the provisions of the general act for . . . workers' compensation." 309 U.S. at 378. For those reasons, and because the pre-existing law justified "the same amount due under the award authorized by this act," the Court found "no violation of the due process clause." *Id.* Similarly, the Court concluded that Congress had not invaded "the judicial function." *Id.* at 381; see also *Graham* v. *Goodcell*, 282 U.S. 409, 426 (1931) (act affecting tax proceeding did not violate due process because this was "not a case of an attempt retroactively to create a liability in relation to a transaction as to which no liability had previously attached"); *Forbes Pioneer Boat Line* v. *Bd. of Comm'rs*, 258 U.S. 338, 339 (1922) (Holmes, J.) (finding due process violation in state legislation that reversed challenge to administrative action and thus "take[s] away from a private party . . . money that is due when the act is passed").

This mistake regarding the constitutional underpinnings of the petition also leads the United States to err in equating this case with *National Coalition to Save Our Mall*, 269 F.3d 1092. U.S. Opp. 12-15. The United States concedes that *National Coalition* excluded from its holding acts of Congress that offend particular constitutional provisions, including the Due Process Clause (see 269 F.3d at 1097; U.S. Opp. 13), and the due process and related constitutional

infirmities of § 4412(b)(1) readily distinguish this case from the regulatory action addressed in *National Coalition*.

5. Finally, two respondents (but not the United States) argue that this case is a poor vehicle to address the scope of *Klein* because uncertainty surrounds the statutory construction not of § 4412(b)*(1)*, but of § 4412(b)*(2)*. Williams Opp. 14-16; PS Opp. 28-30. These respondents assert that § 4412(b)(2), which applies to all TAPS quality bank disputes other than this proceeding, is subject to contrasting and unresolved interpretations, some of which (if applied to petitioner) could be less favorable than § 4412(b)(1).

This argument provides no basis for denying the petition. No uncertainty surrounds the relevant statutory provision, § 4412(b)(1), which applies only to this proceeding and which FERC finally concluded required a particular outcome adverse to petitioner. Pet. App. 166a. Section 4412(b)(2) will never be applied to this dispute, and any "uncertainty" surrounding that provision is entirely artificial.[5] That subsection provides that, for all claims other than petitioner's, retroactive relief can extend to "the 15-month period immediately preceding the earliest date of the first order of the [FERC] imposing quality bank adjustments in the proceeding." Pub. L. No. 109-59, § 4412(b)(2), 119 Stat. at 1778-79. Respondents Petro Star and Williams assert that the provision *could* be construed, if hypothetically applied to petitioner, to extend back only to the first FERC

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[5] Similarly, respondent OXY USA claims that it was "not inconceivable" that § 4412(b)(1) could theoretically have encompassed proceedings other than this one, but even OXY USA does not suggest that it in fact did so. *See* OXY USA Br. 4-5, 19-20.

order granting retroactive relief, rather than the first order imposing a quality bank adjustment (which occurred in late 1993, see *Trans Alaska Pipeline Sys.*, 65 FERC ¶ 61,277 (1993)). Williams Opp. 14-16; PS Opp. 28-30. But § 4412(a) defines the term "TAPS quality bank adjustments" without reference to any retroactive relief, and no other basis exists for reading a retroactivity requirement into § 4412(b)(2). Unsurprisingly, respondents OXY USA Inc. and Union Oil, even while observing that FERC has not resolved the issue, candidly concede that they have no quarrel with petitioner's straightforward construction of the plain meaning of the provision. OXY USA Opp. 6.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition should be granted.

Respectfully submitted,

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No. 08-212

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals For the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. Counsel for Petitioner has consented to the filing of this brief, as has counsel for Respondents Federal Energy Regulatory Commission, ConocoPhillips Alaska, Inc., Petro Star Inc., and Flint Hill Resources Alaska, LLC. Counsel for *amici* wrote to counsel for Respondents Williams Alaska Petroleum Inc., OXY USA, Inc., and Union Oil Co. of California by letters dated September 3, 2008 to request consent, but did not receive a response. Accordingly, this motion for leave to file is necessary.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government. In particular, WLF has regularly appeared in this Court and other federal courts to support its view that separation-of-powers principles embedded in the U.S. Constitution bar any branch of the federal government from exercising powers rightfully belonging to another branch. *See, e.g., Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

WLF is concerned that the decision below eliminates all constraints on the ability of Congress to direct a result in a particular judicial proceeding, without repealing or amending the general law underlying the litigation. WLF believes that at least

some restraints of that type are necessary to ensure that Congress exercises only those powers delegated to it under the Constitution and that its proceedings are not corrupted by the ability of a few individuals to obtain special treatment not available to others. Adherence to the rule of law demands nothing less.

WLF has no direct interest in the outcome of this litigation, financial or otherwise. Accordingly, WLF can provide the Court with a perspective not shared by any of the parties.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Constitution permits Congress to enact legislation dictating the retrospective remedy available to private parties in a single pending adjudication, while creating a different legal standard that will apply in all future proceedings of the same kind.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The interests of the Washington Legal Foundation are more fully set forth in the accompanying motion for leave to file this brief.[1]

WLF is concerned that the decision below eliminates all constraints on the ability of Congress to direct a result in a particular judicial proceeding, without repealing or amending the general law underlying the litigation. WLF believes that at least some restraints of that type are necessary to ensure that Congress exercises only those powers delegated to it under the Constitution and that its proceedings are not corrupted by the ability of a few individuals to obtain special treatment not available to others. Adherence to the rule of law demands nothing less.

STATEMENT OF THE CASE

This case involves a long-running proceeding before Respondent Federal Energy Regulatory Commission (FERC) regarding the allocation of funds generated from the flow of crude oil through the Trans Alaska Pipeline System ("TAPS"). The most recent

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for WLF provided counsel for Respondents with notice of its intent to file this brief.

phase of those proceedings began in 1993 and has involved several FERC decisions and several appeals to the U.S. Court of Appeals for the District of Columbia Circuit.

The proceedings neared their conclusion in 2004, when an Administrative Law Judge (ALJ) assigned by FERC to resolve several outstanding matters issued a 949-page Initial Decision ("ID") that decided the remaining disputes among TAPS participants.[2] It is uncontested that the ID determined that two Alaska-based oil refiners, Williams Alaska Petroleum, Inc. and Petro Star Inc., had significantly underpaid the Quality Bank for oil they removed from the TAPS common stream. Petitioner ExxonMobil has estimated that the two refiners' combined refund liability under the ID

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[2] As explained more fully in the Petition, the disputes centered around how TAPS participants would compensate one another for the fact that TAPS combines all the oil it receives from various companies into a common stream, and thus when a company is allocated oil at the south end of the pipeline in Valdez, Alaska, it "will not in all likelihood receive the same quality of oil at Valdez that it delivered to the pipeline." *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1287 (D.C. Cir. 2000). FERC in 1993 approved the methodology to be used in arriving at a value for the crude oil each participant placed into and withdrew from the pipeline stream (and thus how much money each participant would receive from, or be required to pay into, a "Quality Bank"). Subsequent proceedings before FERC and the D.C. Circuit have focused on arriving at appropriate compensation amounts using that methodology. The parties have been on judicial notice since a 1999 D.C. Circuit decision, *Exxon Co., USA v. FERC*, 182 F.3d 30 (D.C. Cir. 1999), that compensation would be payable for all oil that flowed through TAPS from 1993 forward. The appeals court explained that retroactive payments were warranted because the parties knew by at least 1993 that the prior, provisional valuation methodology was contested and subject to change. *Id.* at 49.

likely exceeded $125 million, dating back to December 1, 1993. Pet. 6. The decision was much more favorable to several TAPS participants; ExxonMobil, for example, was entitled to refunds in excess of $150 million under the ID. *Id.*

The Alaska oil refiners were disappointed with the ID. But they did not confine their appeals to the ongoing proceedings. Instead, they also appealed to the Alaska congressional delegation for assistance. The result of that appeal was July 2005 legislation adopted by Congress without hearings, committee reports, or floor debate. The legislation (which took the form of one provision in a massive appropriations bill) reversed the determination of the ALJ and thereby saved the Alaska oil refiners millions of dollars.[3] It declared that, with respect to the on-going TAPS proceedings and *no other proceedings*, FERC could not order Quality Bank adjustments for any period before February 1, 2000. § 4412(b)(1), Pet. App. 202a. The legislation then set forth, in § 4412(b)(2), the general law that would govern all other TAPS Quality Bank proceedings with regard to the award of retrospective adjustments. *Id.* at 202a-203a. Had that general law been made applicable to these proceedings, ExxonMobil would have been entitled to the full retrospective adjustments ordered by the ID, dating back to 1993. In other words, the limitation on retroactivity imposed by § 4412(b)(1) applied to these

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[3] *See* § 4412 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), Pub. L. No. 109-59, 119 Stat. 1144 (2005). Section 4412 first appeared in the bill when the conference report was issued on July 25, 2005. SAFETEA-LU was passed by both houses of Congress the next day.

proceedings but to no other current or future TAPS Quality Bank proceedings.

Thereafter, this case proceeded in accord with § 4412(b)(1), not in accord with the ALJ's determination that refunds should be retroactive to 1993. The full Commission addressed only those refund claims for periods on or afer February 1, 2000, the date specified in § 4412(b)(1). Pet. App. 183. FERC agreed with the ALJ that retroactive refunds from February 1, 2000 onward were appropriate because (as the D.C. Circuit had noted earlier in its 1999 decision), the refiners were on notice in 1993 that the prior, provisional valuation methodology was contested and subject to change. *Id.* at 190a.

ExxonMobil sought review of FERC's decision in the D.C. Circuit. Among the issues it raised was its claim that § 4412 was unconstitutional under separation-of-powers principles. The D.C. Circuit affirmed FERC's decision in all respects. Pet. App. 1a-7a. The Court said, "[A]ny claim that Congress's decision here unconstitutionally exercised judicial power is foreclosed by our decision in *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001)." *Id.* at 4a. ExxonMobil has appealed solely on the separation-of-powers issue.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. Ever since its decision in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), this Court has recognized that there are limitations on how far Congress may go in adopting legislation that encroaches

on powers allocated by the Constitution to the other branches of government. *Klein* held that when Congress prescribes rules of decision in a pending adjudication without amending the law to make those rules generally applicable, it violates separation-of-power principles. 80 U.S. at 146.

Determining the precise line drawn by *Klein* has proven to be a difficult task for the many lower federal courts that have been faced with claims that specific federal statutes are unconstitutional on the grounds that they entail an inappropriate congressional exercise of judicial or executive power. The Petition lists a number of the many cases in which federal appeals courts have come to divergent conclusions regarding how *Klein* should be applied. Nonetheless, the difficulty of the task does not justify the D.C. Circuit's decision to abandon it altogether, as the D.C. Circuit has done in this case and in its prior *National Coalition* decision (on which it expressly relied in this case).

In adopting § 4412, Congress did precisely what *Klein* condemned: it prescribed a rule of decision in a proceeding that had been on-going for more than a decade in front of FERC and the D.C. Circuit, yet it indicated that that rule of decision should not apply prospectively in similar adjudications. By summarily rejecting a challenge to § 4412, the D.C. Circuit has made clear that it is unwilling to impose *any* constraints on Congress based on *Klein*. Review is warranted to provide guidance to the lower federal courts regarding what, if any, limitations *Klein* continues to impose on congressional actions.

This case is a particularly good vehicle for

addressing the scope and continued vitality of *Klein*. First, there is no credible argument – as has arisen in other cases raising *Klein* issues – that when it prescribed a rule of decision in this case, Congress also changed the underlying generally applicable law. The retroactivity rules adopted by § 4412(b)(2) for future TAPS Quality Bank proceedings are not the same as those imposed on this proceeding by § 4412(b)(1); under the rules established by § (b)(2), ExxonMobil would have been entitled to the full retroactive adjustments ordered by the ID. In *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992), because the Court determined that Congress's change in the generally applicable law made *Klein* inapplicable, it had no occasion to determine the precise scope of *Klein*; no similar vehicle problem exists here.

Second, this case raises separation-of-powers concerns in the starkest manner possible: it singles out one and only one adjudication for special treatment. A principal reason that the framers limited Congress's power to exercise adjudicative functions was their fear that a legislature that decides issues on a case-by-case basis (as many colonial legislatures did) is more likely to act oppressively. By requiring Congress to act generally, rather than particularly, separation-of-powers principles minimized the chance of oppressive legislation; the theory was that if everyone in a particular class were equally affected by a legislature's rule, all class members would act collectively to ensure that the legislature was fair to the class. If Congress is permitted to assume adjudicative functions, that safeguard is lost, and minorities without equal access to the Halls of Congress may find themselves treated less favorably than others similarly situated. The dangers of oppression are at

their peak when, as here, Congress has undertaken an adjudicative function in a manner that not merely adversely affects a small group of litigants, but rather confines its effects to a *single* judicial proceeding. Review is particularly warranted because of the singular nature of Congress's intervention into the adjudicative process; presumably, if *Klein* is to have any continued viability, the case for its application is strongest when, as here, Congress has acted in such a singular manner.

Third, review is appropriate because of all the constitutional provisions designed to protect individual rights, separation-of-powers is the one best suited for addressing issues of the sort raised here. For example, all agree that § 4412 violates ExxonMobil's rights under the Due Process Clause unless it has some rational basis. WLF has yet to hear any such rational basis articulated in this case. Yet, the rational basis test can be exceedingly difficult for courts to apply in practice. When, as here, supporters of § 4412 have come up with so many theories regarding why the statute should be deemed to have a rational basis, it can be very difficult for a reviewing court to separate the irrational from the just-barely-rational; no bright line separates the two. WLF submits that by granting review, the Court can articulate a bright-line *Klein* test that will permit lower courts to differentiate between legitimate congressional legislation and legislation that crosses the separation-of-powers line.

Finally, the fact that the underlying adjudicative proceedings involve both the Executive Branch and the judiciary does not detract from the appropriateness of using this case to examine the scope and viability of *Klein*. Separation-of-powers principles guard against

congressional intrusions into powers belonging to either of the other branches of government, not merely to the judiciary. Moreover, this Court has long viewed adjudicative proceedings before Executive Branch agencies – generally accompanied by appeal rights to Article III courts – as judicial in nature. Indeed, *Klein* itself involved congressional interference not with an Article III court but with the Court of Claims, which in the 19th Century was clearly understood to be an Article I court that lacked the powers exclusive to an Article III court.

I. This Case Is a Good Vehicle for Providing Guidance on *Klein*, Because Congress Did Not Amend Applicable Law When It Prescribed a Rule of Decision in the Case

Ever since its decision in *Klein*, this Court has recognized that there are limitations on how far Congress may go in adopting legislation that encroaches on powers allocated by the Constitution to the other branches of government.

Klein held unconstitutional, on separation-of-powers grounds, a federal statute that "prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it." 80 U.S. at 146.[4]

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[4] *Klein* was a suit to recover the proceeds of property seized and sold by the Union Army during the Civil War. The plaintiff claimed a right to recovery based on legislation allowing recovery by the original owners of seized property if they could prove that they had been loyal to the Union. The Court had held in a prior case that receipt of a presidential pardon was sufficient proof of loyalty. After Klein prevailed in the Court of Claims, Congress in 1870

In the 137 years since that decision, it has been invoked to invalidate a federal statute only sparingly, and its precise meaning is still deemed far from clear. The Court recently observed, "Whatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut*, 514 U.S. at 218 (quoting *Seattle Audubon*, 503 U.S. at 441).

Seattle Audubon provided the Court with a recent opportunity to clarify the scope and continued viability of *Klein*. The Court ultimately declined to utilize that opportunity, however, because it determined that the federal statute being challenged in that case (a statute governing timber sales in the Pacific Northwest) had not merely prescribed a rule of decision in pending cases but had "compelled changes in law." *Seattle Audubon*, 503 U.S. at 438. Under those circumstances, the Court concluded, *Klein* was inapplicable, because whatever the scope of *Klein*, it can only apply in those cases in which

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passed a statute providing that: (1) presidential pardons were not adequate proof of loyalty; and (2) acceptance of a pardon that specified that the recipient had supported the Confederacy was affirmative proof of *disloyalty*. The statute further directed that upon proof of acceptance of such a pardon, the Court of Claims and the Supreme Court should dismiss the suit for want of jurisdiction. 80 U.S. at 141-44. The Court struck down the 1870 statute on separation-of-powers grounds, holding that Congress exceeded its powers when it sought to prescribe rules of decision in pending cases such as Klein's. *Id.* at 146. The Court explained: "In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such judgment should have, and is directed to give it an effect precisely contrary. [¶] We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial branch." *Id.* at 147.

Congress seeks to impose rules of decision in pending cases without amending the law to make those rules generally applicable. *Id.* at 441.

In contrast, there is no credible argument that when it prescribed a new rule of decision in *this* case, Congress also changed the underlying generally applicable law. The current generally applicable law governing future TAPS Quality Bank proceedings is set forth in SAFETEA-LU § 4412(b)(2). It provides that when ordering refunds to TAPS participants from the Quality Bank, FERC may order retrospective refunds back to a date 15 months before FERC's first adjustment order. That provision is essentially identical to the generally applicable law as it stood before adoption of § 4412.[5] But by virtue of § 4412(b)(1), Congress has decreed that in this proceeding and this proceeding only, FERC is not permitted to order retrospective refunds for the period preceding February 1, 2000. Thus, this case does not contain the feature – a change in applicable law – that prevented the Court in *Seattle Audubon* from addressing *Klein*'s scope and continued viability.[6]

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[5] In these proceedings, FERC issued its first order adjusting valuations on November 30, 1993. So § 4412(b)(2) would have authorized retrospective refunds to ExxonMobil dating back 15 months from that first order (*i.e.*, as far back as September 1992) – a date that considerably preceded the December 1, 1993 refund date established in the ALJ's decision.

[6] In any event, the D.C. Circuit decided the case on the understanding that § 4412 did not change the underlying general law to conform to the rule of decision made applicable to this case by § 4412(b)(1). Thus, any dispute by Respondents regarding the accuracy of that assumption would not be an appropriate issue for

Another feature of this case that makes it a particularly suitable candidate for review is that the only relief sought by ExxonMobil is the recovery of funds owed by virtue of its past TAPS shipments. The Court recently held that *Klein* is inapplicable to congressional statutes designed to alter prospective relief available in pending litigation. *Miller v. French*, 530 U.S. 327, 344 (2000) ("Prospective relief under a continuing executory decree remains subject to alteration due to changes in the underlying law."). In explaining *Klein*'s inapplicability, the Court said that the existence of pending litigation cannot restrict Congress's authority to declare what the law should be in the future, and thus that it makes no sense to permit a court to grant or keep in place prospective relief based on law that is no longer in effect. *Id.* at 347.[7] Similarly, the Court held in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), that Congress was entitled to adopt legislation declaring that a bridge

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resolution by this Court in the first instance. Rather, should the Court grant review and ultimately agree with ExxonMobil's understanding of *Klein*, Respondents would be free to raise the issue on remand.

[7] *Miller* also provides an alternative explanation for the Court's decision in *Seattle Audubon*. The plaintiffs in the latter case were seeking to maintain injunctions against certain timber sales in the Pacific Northwest. Congress adopted a statute that established new rules governing those sales, and all agreed that continued injunctive relief was likely unwarranted under the new statute. *Seattle Audubon*, 503 U.S. at 436. If one applies to *Seattle Audubon* the later holding in *Miller* (that Congress is always free to require application of new law to existing injunctive decrees), Congress did not violate separation-of-power principles when it passed legislation that effectively required the injunction against Northwest timber sales to be lifted.

no longer posed an unwarranted hazard to navigation, and thereby effectively require a court to lift an injunction against the bridge that was based on a legal conclusion that the bridge was, indeed, an unwarranted hazard to navigation.

This case does not involve any requests for prospective relief. Rather, as in *Klein*, the Petitioner seeks only a retrospective remedy: the recovery of funds owed to it from the Quality Bank. The absence of any claim for prospective relief that might prevent the Court from determining the scope and continued viability of *Klein* makes this case a particularly attractive candidate for review.

II. This Case Raises Separation-of-Powers Concerns in the Starkest Manner Possible: It Singles Out One Adjudication for Special Treatment

A federal statute raises particular separation-of-powers concerns when, as here, its works to the detriment of a single party in a single judicial proceeding. For example, Justice Breyer has stated: "[A]s Justice Powell has pointed out, the Constitution's 'separation-of-powers' principles reflect, in part, the Framers' 'concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person.'" *Plaut*, 514 U.S. at 242 (Breyer, J., concurring in the judgment) (quoting *INS v. Chadha*, 462 U.S. 919, 962 (1983) (Powell, J., concurring in the judgment)). Review is particularly warranted because this case raises separation-of-powers issues in the very type of case that was the focus of Justice Powell's concern: a statute that focuses on a single judicial proceeding and imposes a

"substantial deprivation" on a single party. *See Seattle Audubon*, 503 U.S. at 441 (expressly reserving decision on whether legislation that targets pending adjudicative proceedings and that is challenged on separation-of-powers grounds is rendered unconstitutional by virtue of its focus on an extremely narrow subject matter).

Plaut explained at length that separation-of-powers principles were embedded in the Constitution in large measure in response to excessive interference by state legislatures with judicial proceedings during the colonial period. *Plaut*, 514 U.S. at 219-222. By the 1780s, many of the Framers, including Madison, Jefferson, and Hamilton, came to believe that the strict separation of legislative and judicial powers was necessary to avoid the dangerous concentration of power in the legislature. *Id.* at 221-22. "This sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution." *Id.* at 221. By requiring Congress to act generally, rather than particularly, separation-of-powers principles minimized the chance of oppressive legislation; the theory was that if everyone in a particular class were equally affected by a legislature's rule, all class members would act collectively to ensure that the legislature was fair to the class. *See* William D. Araiza, *The Trouble with Robertson: Equal Protection, The Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1089-1093 (1999); *Chadha*, 462 U.S. at 962 (Powell, J., concurring in the judgment).

If Congress is permitted to assume adjudicative

functions, that safeguard is lost, and minorities without equal access to the halls of Congress may find themselves treated less favorably than others similarly situated. The dangers of oppression are at their peak when, as here, Congress has undertaken an adjudicative function in a manner that confines its adverse effects not (as is often true) to a small group of litigants, but rather to a *single* judicial proceeding. For example, in voting to strike down, on separation-of-powers grounds, a legislative veto that permitted either the House or Senate to overrule an ALJ's decision to suspend the deportation of an individual alien, Justice Powell warned:

> The impropriety of the House's assumption of this function is confirmed by the fact that its action raises the very danger the Framers sought to avoid – the exercise of unchecked power. . . . The only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to "the tyranny of a shifting majority."

Chadha, 462 U.S. at 966 (Powell, J., concurring in the judgment).[8] In sum, § 4412(b)(1)'s focus on but a single

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[8] The manner in which § 4412 was adopted bears out Justice Powell's fear that political constraints are inoperative when Congress considers legislation affecting only a single proceeding. Congress adopted § 4412 without a hearing, a committee report, or floor debate. It was added to a massive appropriations bill, at the behest of the Alaska congressional delegation, on the evening before the bill was adopted.

judicial proceeding renders Congress's adoption of the statute particularly problematic under separation-of-powers principles and highlights the importance of granting review.

WLF acknowledges that, on at least one occasion when deciding whether federal legislation unfairly singled out an individual for adverse treatment, the Court has suggested that Congress may properly legislate with respect to "a legitimate class of one." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 472 (1977). But that statement arose in connection with the Court's consideration of a claim under the Bill of Attainder Clause, not with respect to a separation-of-powers claim. Moreover, the Court's basis for determining that Congress had not violated the Bill of Attainder Clause was that President Nixon failed to demonstrate that the challenged statute imposed a punishment on him; the Court mentioned only in passing that it believed that Congress could properly treat President Nixon as different from all other Presidents. WLF respectfully suggests that *Nixon* is not relevant to *Klein* cases, in which courts have shown particular concern with regard to congressional legislation that focuses on but a single proceeding.

In any event, there is no evidence to suggest that this particular proceeding could possibly qualify as "a legitimate class of one." There is no principled difference between this proceeding and any other TAPS Quality Bank adjustment proceeding, yet § 4412(b)(2) provides that other such proceedings are not subject to the rule of decision imposed by Congress on this case. In the absence of such a principled difference, Congress's adoption of a statute that imposes a

substantial deprivation on parties to a single proceeding (and on no others) highlights the importance of granting review to consider the scope and continued vitality of *Klein*.

III. Separation-of-Powers Analysis Provides the Most Appropriate Means of Addressing Cases of This Sort

The Constitution includes a number of provisions intended to protect individuals from being treated unfairly by the federal government. In addition to separation-of-powers principles, other provisions protecting individuals in a civil context from unequal treatment include the Fifth Amendment's Due Process and Takings Clauses, Article I, § 9's Bill of Attainder Clause, and Article IV, § 2's Privileges and Immunities Clause. Indeed, in the court of appeals ExxonMobil argued that Congress's adoption of § 4412 also violated the Due Process Clause (including that clause's equal protection component).

Each of the provisions cited above at least arguably was violated by the adoption of § 4412. WLF nonetheless respectfully submits that for cases arising in this context (*i.e.*, congressional adoption of a statute that applies a new rule of decision to a pending case without simultaneously changing existing law), separation-of-powers is the constitutional principle best suited to addressing a claimant's assertion that he has been unfairly treated. The courts are capable of establishing bright-line rules to apply to separation-of-powers claims that are not so easily drawn in cases asserting other constitutional claims.

ExxonMobil's assertion of a due process violation provides a good illlustration. The D.C. Circuit correctly recognized that for § 4412 to be sustained in the face of a due process or equal protection claim, there must exist a "'reasonably conceivable state of facts that could provide a rational basis for' it." Pet. App. 4a (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). ExxonMobil has presented powerful arguments that § 4412 lacks a rational basis. Pet. 17. But given the leniency of that standard, courts are often very reluctant to conclude that a statute lacks any conceivable rational basis, even when (as here) all of the purported rationales make little or no sense.[9] Under

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[9] In defense of § 4412's rationality, the D.C. Circuit said that "Congress could easily have concluded that limiting the retroactivity of refunds would help provide certainty to parties affected by FERC's decision." Pet. App. 4a. That is utter nonsense. A law can provide "certainty" only by establishing new rules with future application. Section 4412(b)(1) had no future application; it simply redistributed the economic pie among companies that had used TAPS between 1993 and 2000, and at the same time made clear that the reallocation formula would *not* apply in future proceedings. Moreover, the company that had the most to gain from § 4412, Williams Alaska Petroleum, Inc., had sold its Alaska refining operations by the time § 4412 was enacted and thus had no reason to seek any sort of certainty regarding future TAPS Quality Bank proceedings.

Some shippers argued in the D.C. Circuit that § 4412 could be viewed as a "rational compromise between the parties advocating complete retroactivity and those advocating no retroactivity." But simply because some parties made self-serving arguments opposing retroactivity (arguments which were completely rejected by the ALJ) does not render rational Congress's decision to provide them with substantially more than half of loaf. Given the absence of any articulatable basis for challenging the ALJ's allocation of Quality Bank obligations under the allocation formula adopted in 1993

those circumstances, the Due Process Clause loses its utility as a means of correcting unfair treatment of individuals in cases of this sort. It is simply too difficult for a reviewing court to separate the irrational from the just-barely-rational in these types of cases; no bright line separates the two.

In contrast, the *Klein* doctrine provides the Court with an opportunity to establish a relatively clear line between permissible congressional statutes and those that cross the line into an unconstitutional exercise of judicial power. The Court could establish a bright-line rule, based on *Klein*, that a statute violates separation-of-powers principles when it: (1) establishes a rule of decision in a single pending lawsuit (or a very small number of lawsuits) seeking a retrospective remedy; (2) fails simultaneously to amend generally applicable law to conform to that rule of decision. Review is appropriate to determine whether such a bright-line rule is warranted. By limiting the rule to pending lawsuits seeking a *retrospective* remedy, the Court can avoid difficulties that arise -- particularly with respect to defining what constitutes generally applicable law -- whenever the plaintiff is seeking prospective relief, such as an injunction. *See, e.g., Miller v. French*; *Seattle Audubon*; *Pennsylvania v. Wheeling & Belmont Bridge Co.*; *National Coalition to Save Our Mall v. Norton*. In contrast, such difficulties are unlikely to arise when

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(indeed, the D.C. Circuit rejected all challenges to that allocation) and given the awareness of all parties since 1993 that the prior, provisional allocation methodology was contested and subject to change, Congress's alleged desire to arrive at a "compromise" reallocation of funds does not provide a rational basis for adoption of § 4412.

Congress is stepping into a pending lawsuit for the sole purpose of re-allocating economic resources among competing litigants.

IV. *Klein* Applies to Cases, as Here, That Involve Proceedings Both Before Article III Courts and Before Executive Branch Agencies

The most recent phase of these proceedings has been on-going since 1993. The proceedings have included multiple decisions by an Article III court: the D.C. Circuit. They have also included numerous decisions by a federal administration agency (FERC) acting in an adjudicatory capacity.

The inclusion of an Executive Branch agency in the adjudicatory process does nothing to detract from the appropriateness of using this case as a vehicle for examining the scope and viability of *Klein*. Separation-of-powers principles guard against congressional intrusions into powers belonging to either of the other branches of government, not merely those belonging to the judiciary.

Moreover, this Court has long viewed adjudicative proceedings before Executive Branch agencies – generally accompanied by appeal rights to Article III courts – as judicial in nature. As Justice Powell explained in *Chadha*:

> We have recognized that regulatory agencies and departments of the Executive Branch often exercise authority that is "judicial in nature."

> *Buckley v. Valeo*, 424 U.S. 1, 140-41 (1976). This function, however, forms part of the agencies' execution of public law and is subject to procedural safeguards, including judicial review, provided by the Administrative Procedure Act, see 5 U.S.C. § 551 *et seq.*

Chadha, 462 U.S. at 966 n.10 (Powell, J., concurring in the judgment). Where Executive Branch agencies are properly exercising powers that are judicial in nature and that are subject to review by Article III courts, there is every reason to provide those activities with the same protection against congressional encroachment that is afforded to Article III courts.

Indeed, *Klein* itself involved congressional interference not with an Article III court but with the Court of Claims, which in the 19th Century was clearly understood to be an Article I court that lacked the powers exclusive to an Article III court. *See, e.g., Ex Parte Bakelite Corp.*, 279 U.S. 438, 455 (1929) (the Court in *Klein* made clear its understanding that the Court of Claims was an Article I court). Yet, the Court in *Klein* nonetheless did not hesitate to rule that Congress had violated separation-of-powers principles when it supplied a rule of decision in an ongoing Court of Claims proceeding. Similarly, the mere fact that a portion of the adjudicative proceedings at issue here took place in hearings conduct by an Executive Branch agency should not cause the Court to hesitate in granting review in this case to clear up the widespread confusion regarding the meaning of *Klein*.

That such widespread confusion exists is not open to serious challenge. In addition to the confusion among

the federal appeals courts cited by the Petition, legal commentators have repeatedly expressed similar confusion. *See, e.g.*, Martin H. Redish, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437, 438 (2006); Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998); J. Richard Doidge, *Is Purely Retroactive Legislation Limited by the Separation of Powers: Rethinking United States v. Klein*, 79 CORN. L. REV. 910, 918 (1994). WLF respectfully submits that this Petition provides the Court with an ideal opportunity to seek to resolve that confusion.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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